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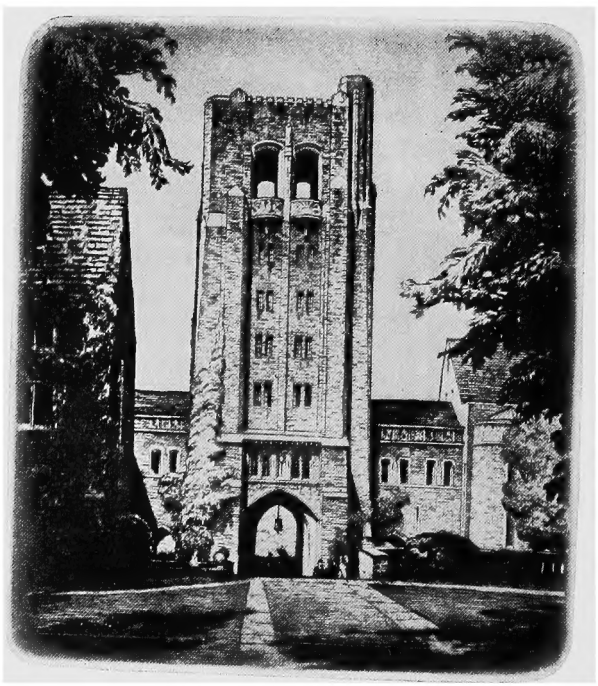

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For my personal friend
& frequent adviser
Merritt King Esq.
Ithaca N.Y.
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W. F. Ward.

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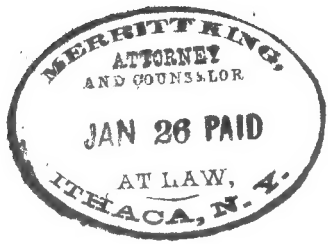
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ECCLESIASTICAL LAW

AND

RULES OF EVIDENCE,

WITH SPECIAL REFERENCE TO THE

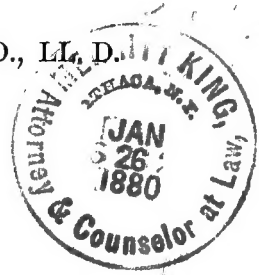
JURISPRUDENCE OF THE METHODIST EPISCOPAL CHURCH.

BY

HON. WILLIAM J. HENRY

AND

WILLIAM L. HARRIS, D. D., LL. D.



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PREFACE.

THE word "Church," as used in the New Testament, in ecclesiastical history, and in general literature, has a great variety of meanings. In a limited sense, it is used to designate any particular denomination of Christian believers, professing one creed, observing the same rites, and organized under one ecclesiastical government. In order to its power, perpetuity, and usefulness as a religious institution, such a Church must maintain and set forward a system of sound doctrine and good morals, provide for and support evangelical worship in its simplicity and purity, enjoin a due observance of the holy sacraments, secure a faithful and impartial administration of godly Church discipline, and with all diligence labor to promote Scriptural holiness in all manner of conversation. The sphere of its government and discipline is purely spiritual, and in its legislation and administration the Church should seek, in all legitimate ways and to the extent of its authority, to prevent whatever would corrupt its doctrines, subvert its order, interrupt its peace, or stain its purity. Nothing scandalous or offensive should be allowed in its members; every Christian and churchly duty should be faithfully fulfilled; and all things should be done with seemliness and order, unto edification and to the glory of God. All these things are, therefore, proper subjects for the thoughtfulness, care, and authority of the Church.

In the Methodist Episcopal Church, the authority to make rules and regulations for its government lies with the General Conference, a body meeting once in every four years, and composed of chosen delegates from the ministry and from the laity of the Church. This body has full powers, under certain specified restrictions, to make and en-

force rules for the government of the moral and Christian deportment of all the members and ministers of the Church, and also to prescribe such prudential regulations as may seem necessary to the good order and efficiency of the church as an ecclesiastical organization. So that all disciplinary rules may, with propriety, be referred to one or the other of two classes: (1) Such as relate to the moral and religious conduct of members of the Church as professing Christians, and (2) Such as relate to the order and discipline peculiar to the Methodist Episcopal Church as a distinct ecclesiastical organization.

The Holy Scriptures constitute the primal and supreme standard of Christian character and conduct, and their authority is recognized, maintained, and enforced in the discipline of the Church. Any conduct in a member or minister of the Church which can be shown to be condemned by the precepts and principles of the Word of God is sufficient, according to the Discipline of the Church, to authorize and justify the application of a suitable penalty to such person, even though the General Conference may not have formulated, in the Book of Discipline, a distinct and specific rule against that exact form and mode of delinquency or transgression. The rules of the Church very properly require, also, of all who would continue their membership in her communion, that they faithfully conform to the order and discipline of the Church.

The aim and purpose of Church discipline should be, primarily, not to exclude persons from the Church, but to keep them within its pale so long as such a relation can be made tributary to their spiritual interests and welfare; but if they are incorrigible, if they will not repent and reform, then the aim and purpose of discipline is to purify the Church and vindicate its character and honor by excluding the unrepentant offender from its communion. For all violations of the divine law as laid down in the Holy Scriptures, and for all disobedience to the order and discipline of the

Church, the ultimate penalty, if the offender will not repent and reform, is excommunication. This penalty is the judicial exclusion of the offending person from the religious rites and privileges of the Church. It is the severest penalty known to Church discipline, and is founded upon the nature of the organization, the terms of admission to its fellowship, and upon a right inherent in all religious societies to withdraw from all fellowship with unreasonable and wicked men, and therefore from all responsibility for their conduct.

In the Methodist Episcopal Church the power of excommunication lies with the minister or preacher in charge, after the accused party shall have been arraigned on specific charges and shall have been duly tried and convicted by a jury of his peers according to provisions laid down in the Book of Discipline. The Constitution of the Church provides that no law or rule shall ever be made by the General Conference doing away the privilege of accused ministers or members of trial by conference or committee, and of the right of appeal. In order that the constitutional guarantee should be made good, it became necessary for the General Conference to create or designate certain tribunals for the trial of accused persons—some of these tribunals to have original, and others appellate, jurisdiction—and to establish general principles and rules of proceedings in all Church trials. Hence arose the whole system of ecclesiastical jurisprudence of the Methodist Episcopal Church.

In the first organization of the Church the rules and regulations for its government were few and simple; but as the Church grew and multiplied, and the conditions and circumstances of its members as well as of society about them were changed, the rules necessary for its proper regulation and government became more numerous and complex, so that now when a member or a minister of the Church is accused of crime, or of having indulged in improper tempers or words, or of having committed some imprudent act, or of disobedience to the order and discipline of the Church,

it often becomes a difficult matter to determine what proceedings should be instituted in the case, how the accused person should be tried, before what tribunal, and under what particular rules and regulations. This book has been written with the hope that it may assist the administration in such cases. That among ten thousand pastors, all of whom have to do more or less with the administration of the discipline of the Church, questions will frequently arise which are not answered in this book is to be expected. It could scarcely be otherwise. It is believed, however, that some general principles, having a wide application in the practical administration of the affairs of the Church, have been determined, and that the careful student of our economy may find this book a valuable help. Its doctrines, we think, will be found to be in harmony with the principles and polity of our Church, and its rules of procedure to be drawn from the provisions of the discipline and usages of the Church and the analogies of civil government, so far as those analogies are at all applicable to an ecclesiastical government. In the preparation of the work we have felt the want of a line of well established precedents or landmarks to guide us in our inquiries.

The elementary rules of evidence embodied in this work, though not voluminous, will be found to be clear and complete, and well sustained by citations from the highest legal authorities. In submitting these rules we have aimed to do more than afford guides to judicial investigations before the tribunals of the Church. We believe they will be found valuable for such purposes, but we have endeavored to show in addition that the authenticity of the Holy Scriptures can be vindicated, and their genuineness maintained, by the well recognized and established rules of evidence received and acted upon in our courts of justice and in our different governmental relations.

WILLIAM J. HENRY,
WILLIAM L. HARRIS.

SEPTEMBER 1, 1878.

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ECCLESIASTICAL LAW.

PART FIRST.

INTRODUCTION.

CHAPTER I.

PRELIMINARY.

IN whatever situation man may be placed, he finds himself under the control of rules, emanating from an authority to which he is compelled to yield obedience. The moment he is born he is subject to the will of his Creator. As soon as he enters society he finds himself under the control and dominion of social regulations and subject to conventional rules, to which, either expressly or tacitly, he yields assent. The observance of these regulations for the conduct and government of society is variously enforced; so it may be correctly said that each has its own peculiar sanctions, benefits, burthens, and penal obligations, without which society, as an organized body, could not exist.

We shall not attempt to give a concise and definite idea of the term "law," as it is used by law writers, abstractly considered. The definition given by Blackstone in his commentaries has been criticised by various authors, but for all practical purposes it is sufficiently accurate. He defines law to be a rule of action, dictated by some superior power. But it is not in this broad sense that we propose to consider the term, but in its more restricted sense as applied to the law of the Church; or, in other words, we only propose to consider such laws as denote the rules for the government, not of actions in general, but of human actions or conduct so far as they affect our relations to the Church, having special reference to the fact that the binding efficacy of those laws has its foundation in actual membership.

There is a difference, well defined and recognized, between such laws as are enacted by the Creator and such laws as are enacted and have their force and efficacy from human authority. Ethical writers have referred the origin of all law to one or the other of two sources—nature and revelation. Clearly, however, the distinction between the law of revelation and the law of nature is not substantive. The distinction consists not in the origin of the law, but in the evidence by which it is established and the means employed for its enforcement. In this view of the matter, human authority should not be suffered to come in conflict with the natural or revealed law, any more than the statute of a State should be suffered to come in conflict with the State Constitution; but when there is a conflict, the human, as we shall hereafter show, should yield to the superior authority. There are, however, a great many indifferent points which both natural and divine law leave mankind or society at liberty to enact, and which are found necessary to be established or restricted within certain limits for the well-being, benefit, and good order of society.

CHAPTER II.

THE DIFFERENT PARTS OF A LAW.

ECCLESIASTICAL law, like municipal or civil law, may be divided into four parts: the declaratory, the directory, the remedial, and the vindicatory. The declaratory part is that whereby the right to be observed and the wrong to be avoided are clearly defined. The directory part is that whereby the individual or subject is instructed and enjoined to observe those rights and to abstain from those wrongs fixed and determined by the declaratory part of the law. The remedial part is that whereby a method is pointed out by which a man may recover or vindicate his private rights or redress his private wrongs. The vindicatory part of the law is that whereby it is signified what penalty shall be incurred by those who commit public wrongs or who neglect their duty to society or to the Church as members thereof.[1]

[1] The Church, in a moral or spiritual sense, signifies a society of persons who profess the Christian religion; and in a physical or material sense, the

CHAPTER III.

RULES OF CONSTRUCTION.

In treating this subject we shall find it necessary to enter somewhat into a consideration of the general doctrine of the operation of disciplinary rules and the common or recognized usages of the Church upon one another as respects the construction of each. A disciplinary rule is practically what it purports to be—an addition to the law of the Church. It removes nothing of the old law or former usage further than its terms, either expressly or by necessary implication, require. It falls into the mass of the rules or usages of the Church like a drop of water from the clouds into the ocean, mingling with the mass and forming with it one entire body. Where there is neither an express nor implied repeal of the prior law, whether statutory, disciplinary, or common usage, the new enactment and the disciplinary rules and the common usage are to be construed together as contracting, expanding, and attenuating one another into one harmonious system or doctrine. All are to be construed together *in pari materia;* that is, all disciplinary rules and all rules founded on the usages of the Church relating to the same subject are to be so construed as to harmonize with each other, and should be construed according to the known usages of the Church.

Legal propositions are like moral and ethical ones in this, that they do not lie in parallel lines nor in straight lines, but on the contrary, they converge and diverge, now intercepting each other, now blending together, now operating unconnectedly.

Sometimes a disciplinary provision and a provision founded

place where such persons assemble. The term church is *nomen collectivum;* it comprehends the chancel, aisles, and body of the church. Ham. N. P. 204.

The term Church, as it is used in this country, is ordinarily used with reference to the religion established by Jesus Christ.

Christianity has been judicially declared to be a part of the common law of Pennsylvania, New York, Connecticut, Massachusetts, and several of the other States. 11 Serg. & Rawle, 394; 5 Binn. R. 555; 8 John. 291; 2 Swift's System, 321.

To write or speak contemptuously against it was at common law an indictable offense. Hooper on the Law of Libel, 59 and 114 *et seq.;* 1 Russell on Crime, 217; 2 Howard S. C. Rep. 127, 197, 201.

upon common usages of the Church, like statutory ones, may stand together up to a given point, beyond which they come in conflict. In such a case the prior law is not repealed, but the one or the other simply gives way at the point of difference. For example: a statutory law of the State, or a disciplinary rule of the Church general in its terms, is always taken subject to such exceptions as the common law of the State, or as the common usages of the Church, require. Thus a statute will not make an act criminal, however pointed may be its language, unless the intent of the maker of the law is consistent with the enactment, because the common law of the land and the common usages of the Church, as well as common justice, require such concurrence in order to constitute the crime. A case of overwhelming necessity or of honest mistake of fact will be excepted out of the provisions and even out of the express letter of the statute. This is aptly illustrated by Puffendorf. In speaking of the rules of construction he refers to a Bolognian law which enacted "that whoever drew blood in the streets should be punished with the utmost severity," but was held, after a long debate, not to extend to the surgeon who opened the vein of a person that fell down in the street with a fit. Upon the same principle a disciplinary provision may be extended, modified, or controlled by the common and received usages of the Church. It is likewise a doctrine of the common law, and consonant with reason, that all persons giving aid and comfort to others committing an offense—even a felony—are to be considered as principals; that is, in legal contemplation, committing the crime. Therefore, if a statute makes the doing of a thing criminal, it includes persons present lending their aid and countenance. Every statutory or disciplinary provision carries with it so much of collateral right and remedy as will make its provisions effective.

Whatever is newly created by the General Conference as the law-making authority of the Church draws to it the same qualities and incidents as if it had previously existed as a part of the usages of the Church, and should be continued in all other respects, as far as possible, in harmony with the previously recognized policy. The foregoing rules of construction are not, however, to nullify the plain meaning or the necessarily implied

meaning of the Discipline; for where the words are plain and the sense is unambiguous there can be but slight room for these rules of construction. There is, however, an exception to this rule, and that is, that even if the words are plain, yet where a literal rendering would involve the rule itself in an absurdity, or infringe natural rights, it should be so expounded as to avoid the absurdity and uphold or maintain the right.

In applying the various specific rules of interpretation and construction to cases actually arising in the administration of the Discipline, we recognize two dissimilar methods of interpretation and construction, namely, the one liberal and the other strict. The liberal is that in which the sense is expanded in order to cover a larger space than the language imports. The strict is that in which it is contracted in a less limit or space. But both these are variously modified according to the requirements of particular cases. For example: in applying the rule that each specific clause shall be made to harmonize, if possible, with the general purpose of the entire act, we may have to employ, in regard to all the clauses, an open or close interpretation, or one in one clause and another in another clause, or resort to a middle course, such as the blending of the two in such a manner as will best accomplish the object. Then, to enlarge the idea—since when we pursue a particular statute or disciplinary act we look not at it alone, but at the entire body of the Discipline and the rules and usages of the Church—it often happens that in a particular case we find the general spirit of the enactment urging us to a different interpretation from the one indicated when standing alone; or we may find all the considerations acting together either to expand the law or to contract it. The last rule of construction to which we will refer is this: that cases may arise outside of the letter of the statute and yet within the mischief which it was designed to remedy. In such a case it should be brought within the spirit by construction, for the reason that the lawmakers could not foresee all the cases that would arise under it. This is what may be termed the equity of construction,[1] and

[1] In construing a statute, penal as well as others, we must look to the object in view, and never adopt an interpretation that will defeat its own purpose if it will admit of any other reasonable construction. The Emily and the Caroline, 6 Curtis, 101.

depends upon the particular circumstances of each individual case. There can be no established rules and fixed precepts laid down without destroying its very essence and reducing it to a positive law.

On the other hand, the liberty of considering all cases in an equitable light must not be carried too far, lest we destroy all law and leave the decision of every question in the breast of the administrator—a thing greatly to be deplored. Law without equity or equitable construction, though harsh and disagreeable, is much more desirable for the public good than equity without law, which would make every disciplinary administrator a legislator and introduce infinite confusion, as there would then be almost as many different rules of action, or rules for the government of the members of society as there are differences of capacity and sentiment.[1]

CHAPTER IV.

METHODS OF REDRESS.

THERE are but two methods of redress for private injuries or wrongs, by act of the parties or by investigation before the proper constituted tribunals. There are certain injuries of such a nature that some of them furnish, and others require, a more summary remedy than can be obtained in the ordinary forms of civil procedure. There is allowed in those cases an extra judicial or eccentric kind of remedy. Thus the law justifies acts done by a party in self defense, or in defense of a parent or child, or in defense of husband or wife. There are, however, but few remedies that the law intrusts to the party injured for redress, for it wisely takes into account human frailty and the danger of the party going to such an extreme, prompted either by prejudice or passion, as to perpetrate a manifest injury or wrong under the guise of redress. The other method of redress, which is much oftener resorted to, and the questions arising out of which are far more complex and difficult, we propose in the following pages to consider at length, so far as the same falls within the purview of this treatise.

[1] 1 Blackstone's Com. 61.

CHAPTER V.

THE ORIGIN OF RELIGIOUS ORGANIZATIONS.

RELIGIOUS organization is traceable back to a very early period. If it does not antedate the formation of civil government, it is at least coeval with it. The true foundation of religious organization may be justly referred to the wants and desires of individuals for a closer and more intimate relation with the Deity. We are not of those who believe that there ever was a time after man had multiplied on the earth, when there was no such thing as religious, social, or civil government; or that men, through a sense of their wants and weaknesses as individuals, met on a large plane and entered into an original contract of organization.

This notion of an actually existing state of nature is too wild to be seriously considered; besides, it is plainly contradictory to the revealed account of the primitive origin of government among mankind. The more satisfactory inference is, that societies, religious and civil, were effected by means of the family relation, that relation being ordained of God. It is evident that families formed the first natural societies among themselves, which, by extending their limits into the patriarchal relation laid the first, though imperfect, rudiments of society. It is evident that societies were incapable of existing without rules and regulations for the government thereof; and in order to the establishment of rules and regulations, it was and is necessary that there should be those who were clothed with authority. It is probable that the rules and regulations, as they first existed, were the results of usage, as it must be now in all young societies, before a central authority is firmly established and recognized.

When a society is first formed its rules and regulations are ordinarily few and simple; but as it increases in numbers and wealth, and engages in new enterprises, such rules and regulations become more and more numerous and complex; and as usage is of slow growth, it often becomes necessary to resort to positive enactments in order to meet the growing necessities consequent upon religious enlightenment and intellectual and moral development.

No Church can long exist, much less prosper, when it is behind public opinion, or when it is subservient thereto. The Church should therefore aim to lead and control public opinion rather than to be led and controlled by it; and in order to do this, it is necessary, in every Church organization, that there should exist a governmental power competent to make new rules and regulations so as to change the usages of the Church as often as the exigencies of the organization require it, subject, however, to this important qualification: that no change should ever be made that would tend to destroy its fundamental object.

In order to the existence of government, whether of the Church or of the State, it is necessary that there should be a central power, clothed with authority not only to make rules and regulations for the government of such Church or State, but with authority to enforce obedience, or the observance of those rules, by the infliction of punishment, the object of punishment by human authority being twofold—first, to reform the offender; second, to deter others from the commission of crime, thereby protecting the Church or State from injury. Some writers, however, have doubted the propriety of this definition of punishment, claiming that the government has no right to impose suffering upon one of its subjects for the benefit of itself or for the benefit of others. The objection is undoubtedly founded upon correct principle, subject to this qualification: that no man should be punished unless he deserves punishment as a matter of pure justice, aside from all extraneous considerations. Mr. Eden, in his work on penal laws,[1] says: "Punishments are to be considered as founded upon, and limited by, first, natural justice; second, public utility." It is evident that crime, whether against the natural, revealed, or municipal law, must proceed from a criminal mind, and the motive or intent must, of necessity, be regarded as constituting a controlling element in it. Probably in no one thing does criminal jurisprudence differ from civil more than in the doctrine of intent. The criminal law aims at punishment; the civil law, at compensation.

A man is frequently held to the consequences of his act civilly, though he neither intended it nor suffered himself to be influ-

[1] Eden on Penal Laws, 3d Ed. 6.

enced by an evil mind. Thus, when one has done any thing that inflicts an injury upon another, it is but simple justice that he who inflicts the injury should be made to bear the loss, so far as actual compensation is concerned, rather than the other who has suffered the injury.

There is, however, a large class of civil cases cognizable in our common law courts, where the intent or motive enters as an element in estimating the damages; not to the extent, however, of restricting the party injured to less than the actual damages.[1]

Thus, in all actions of tort or wrong it is proper to show to the jury the *quo animo* or mind with which a thing was done; and in some actions, as in slander, libel, and the like, the intent constitutes the gravamen of the charge; and where there was no wrongful intention in speaking the words or publishing the libel, the party is not liable.[2]

The same rule will hold good when applied to all penal, statutory, and police offenses, arising under the ordinances of towns and cities; and it is in analogy with this latter principle that the intent or motive with which a member of the Church violates any of the provisions of the Discipline enters as an element of inquiry into the investigation.

[1] Where a question of fraud, malice, gross negligence intervenes, and where either of these elements mingle in the controversy, the law, instead of adhering to the system or even the language of compensation, adopts a wholly different rule. It permits the jury to give what is termed punitive, vindictive, or exemplary damages; in other words, blends together the interests of society and of the aggrieved individual, and gives damages not only to recompense the sufferer, but to punish the offender. Sedgwick on Damages, 3d ed., 36.

[2] Now the law is (says Mr. Justice Parker), that accusations made to a body competent to try the offense can not be made the subject of an action of slander. All proceedings in courts of justice come within this rule; so that if the party accusing honestly intended to prefer a complaint, and not to abuse this privilege for the purpose of slandering his adversary, although the matter contained in the complaint would be otherwise libelous and should be untrue, it can not be the foundation of an action of this nature. The proper remedy in such cases is by action for malicious prosecution; and then, if there be no probable cause, and the accuser was influenced by malicious designs, the party injured will obtain satisfaction. 2 Phillips on Evd. 109; *Remington* v. *Cangdon*, 2 Pick. 313; *Jarvis* v. *Hathaway*, 3 John. R. 180.

CHAPTER VI.

THE RELATION OF THE INTENT TO THE ACT.

In our civil tribunals[1] notice is only taken of wrong when the complaining party is legally entitled to complain; and he is only so entitled when, besides having an interest in the matter, he has also sustained an injury. The government that complains in criminal cases does not suffer from the intent or imagination of mind until that imagination has been coupled with a criminal act. Hence the rule that there must be a connection between the intent, motive, or purpose and the act, in order to constitute a crime. With the Church the rule aimed at is different, yet even there it is impracticable to establish any other rule, or a different rule, except to this extent, that a more searching inquiry may be instituted in order to ascertain the true intent of the mind. It is true that in adultery Christ held that the mere desire was evil, so that "he that looketh upon a woman to lust after her hath committed adultery." In Christian ethics the mere designing or entertaining an evil in the mind is equivalent to the commission of the act, and is properly considered as a crime against God, although the injury is not done to the person or property of another. It would be very difficult, if not wholly impracticable, under most circumstances to substantiate such a charge. The entertaining of an evil purpose in the mind of one person,

[1] Who are "civil officers" within the meaning of this constitutional provision is an inquiry which naturally presents itself, and the answer can not, perhaps, be deemed settled by any solemn adjudication. The term "civil" has various significations. It is sometimes used in contradistinction from barbarous, or savage, to indicate a state of society reduced to order and regular government. Thus we speak of civil life, civil society, civil government, and civil liberty, in which it is nearly equivalent in meaning to political. It is sometimes used in contradistinction to criminal, to indicate the private rights and remedies of men as members of the community in contrast to those which are public and relate to the government. Thus we speak of civil process and criminal process, civil jurisdiction and criminal jurisdiction. It is sometimes used in contradistinction to *military* or *ecclesiastical*, to natural or foreign. Thus we speak of a civil station as opposed to a military or ecclesiastical station; a civil death as opposed to a natural death; a civil war as opposed to a foreign war. 1 Story on the Constitution, 791.

however wicked it may be, is incomprehensible to the mind of another, except in those cases where expression has been given to it either by word or deed; and until then no injury has been sustained by the individual, Church, or community, which is cognizable either by the civil or criminal law, or by the canons of the Church.

We are led to inquire whether a particular act prohibited by our civil and criminal law is, by reason of such prohibition, a proper subject of inquiry by the tribunals of the Church.[1]

Civil tribunals do not look merely at the morality of the act, or even at the enormity of the evil sought to be remedied, but at most only primarily at the question as one of governmental judgment, taking into consideration the punishment of the evil-doer according to legislative and judicial rules, and for the promotion of public peace and good order. While these facts are to be considered in Church investigations, ecclesiastical tribunals, in supplying the deficiency of the civil government by elevating the standard of morality, must deal more directly with the conscience, and give greater heed to the moral and spiritual state of her members; therefore, she takes notice of offenses against the law of the Church that are not regarded as offenses against the law of the State or civil government.

CHAPTER VII.

THE RELATION OF THE CHURCH TO THE CIVIL GOVERNMENT.

THE government of the States and the government of the Church, although professing to be separate and distinct and to exist independent the one of the other, are, nevertheless, curiously and necessarily interwoven, and the one can not long exist

[1] It is manifest from the case that the words uttered were uttered in the course of Church discipline by the defendant to the plaintiff, who were both Church members; and whether such discipline was proper or not is not a point for us to determine. Every sect of Christians are at liberty to adopt such proceeding for their regulations as they see fit, not inconsistent with law or injurious to the rights of others. In actions of slander it is of the essence of the action that the words be spoken maliciously, and that, as a matter of fact, belongs to the jury to determine. *Jarvis* v. *Hathaway*, 3 John. 181.

without the other. The government recognizes and clothes the Church with certain powers and authority, and while every State in the Union, by its constitution or organic law, prohibits the recognition of established Churches, and leaves every man free to worship Almighty God according to the dictates of his own conscience, yet they, by legislation, recognize the voluntary association of persons for religious purposes in a way that they recognize voluntary associations for no other purposes; and they also clothe such voluntary societies with certain rights and privileges. In many of the States the law authorizes the formation of religious societies into *quasi* corporations, and clothes them with the power of suing and being sued in the civil courts, and of acquiring, taking, and holding title to real and personal property such as is necessary for the use of such society. They also guarantee to such societies immunity against disturbance while engaged in religious worship. While the government extends its protecting care to the Church, she, in turn, gives to the government a test, or obligation, with which to bind the consciences of all those who hold official relations to the State or government, of those who sit upon juries, and of those who give their evidence in courts of justice or elsewhere.

Formerly it was held with a great degree of strictness, that where a person's conscience would not be affected by the religious sanction of an oath, that he was incapable of sitting upon a jury or of giving his testimony in a court of justice.

The combination tends to produce progress and improvement, so that of the various systems of rules for the government and control of man, none assert their claims with higher sanction than the rules of the Church, founded, as they undoubtedly are, upon the Word of God and the express assent of its members. The obligation of membership, unlike allegiance to the civil government, is a voluntary one. The continuance of Church relationship is also voluntary in this country; however, it was different in England in the Established Church. Any member of a religious society has a right to withdraw and sever his connection with such society, subject, however, to certain limitations, which will hereafter be pointed out.

To show the intimate relation still further between the Church and the government, it will be necessary to refer to the origin

of the Methodist Church. It was first organized in England, under the auspices of John Wesley, as simple societies, with acknowledged subordination to the Church of England, which Church, by a series of parliamentary enactments, was, although unincorporated, made the legally recognized Church, and placed under the fostering care of the government, with the king as its recognized head and supreme governor; and from the king being the head of the Church arose his right of nomination to vacant bishoprics and certain other ecclesiastical preferments. As the head of the Church, the king was likewise the *dernier* resort in all ecclesiastical courts, an appeal lying ultimately to him in Chancery. Thus all ecclesiastical matters were subordinate to the civil government in one form or another. It was under and during the existence of this relationship between the Church and the State that the Methodist Church, as voluntary societies, was formed. Afterward those societies separated from the Church of England and formed themselves into a separate organization,[1] first in England and then in this country. Such was its relation until the close of the Revolution which separated the Colonies from the parent State. The separation of the two countries sundered the relationship of the Church, so intimately

[1] The history of Methodism was for many years the history of Christian effort to evangelize the neglected masses of England. The labors of Wesley and of those whom he inspired to imitate his example were of the noblest description, and met with remarkable success. The zeal which has inspired the body in regard to foreign missions, although in the highest degree honorable, is only the logical development of their efforts at home, for they originally regarded their society in England as simply a vast home mission, and neither Wesley nor his followers desired to consider themselves as a sect—a new Church—in the common usage of the term, but were warmly attached to the old national Church, and considered themselves among her true children.

When Wesley died (in 1791), his societies had spread over the United Kingdom, the Continent of Europe, the States of America, and the West Indies, and numbered 80,000 members. Since then they have largely increased, and, according to the latest official returns, the membership (including the number in foreign missions embracing Continental India, Northern Europe, China, Asia Minor, the South Sea and the West India Islands) amounts to 3,665,880 (of whom 733,989 belong to Great Britain, 20,795 to Ireland), and the number of ministers to 20,817. The annual appropriation of the Missionary Society of the Methodist Episcopal Church in 1870 amounted to $671,180. It has more than 598 missionaries, and 39,088 members, and 7,914 probationers. Chambers's Encyclopedia, Vol. 4, page 425.

was the one interwoven with the other. This separation left the Church in America entirely distinct from the civil government—a mere voluntary association of members, kept together by their religious zeal; and in this condition it grew and prospered from small societies until its moral power is now both recognized and espected.

CHAPTER VIII.

THE RELATION OF THE CHURCH TO THE CIVIL COURTS.

CAN the civil courts limit, restrain, or control the action of Church tribunals? and if so, to what extent? and what is the true boundary that separates the one from the other? The Church in this country, as we previously said, is formed in a mutual covenant of relationship voluntarily assumed by its members and limited to the authority of the Church over actual members; hence it follows as a necessary corollary, that the authority of the Church is founded upon canons to which the members subscribe, either directly or tacitly in becoming members of the Church; and, therefore, they have the right to be tried by the canons of the Church. And the Church, when proceeding in accordance with its established rules and usages, has exclusive jurisdiction, and its action is not liable to be inquired into elsewhere.

It may be, however, that if the Church were to attempt, in exercising jurisdiction over its membership, to exercise an usurped jurisdiction not within the constitution and canons of the Church, that a court of equity, upon a proper case made by a bill in Chancery, might be induced to interfere by injunction. But the exercise of such an authority by a court of equity is not favored, and is very carefully limited and restricted to cases where there is an entire want of authority, by the rules of the Church, to exercise the jurisdiction; for where the right exists in the Church, the civil courts have no authority to direct or control, be the proceedings ever so erroneous.[1]

[1] In the case of *Chase et al* v. *Cheney*, 58 Ills. 533, the Court says: "The minister, in a legal point of view, is a voluntary member of the association to which he belongs. The position is not forced upon him; he seeks it. He accepts it, with all its burdens and consequences; with all the rules and laws and

The true boundary between the Church and the civil government should be carefully maintained, so that each should revolve in its own orbit.

The Constitutions of nearly all the States of the Union provide for the free exercise and enjoyment of religious profession, without discrimination. This guaranty excludes the idea of all interference with religious faith and membership in the Church by the civil courts. Freedom of religious profession can not be maintained if the civil tribunals of the land trench upon the

canons then existing or to be made by competent authority, and can, at pleasure and with impunity, abandon it. If they were merciful and regardful of conscientious scruples, he knew it; if they were arbitrary, illiberal, and attempted to chain the thoughts and consciences, he knew it. They can not, in any event, endanger his life or liberty, impair any of his personal rights, deprive him of property acquired under the laws, or interfere with the free exercise and enjoyment of religious profession and worship, for these are protected by the Constitution and laws. While a member of the association, however, and having an interest in all the benefits resulting therefrom, he should adhere to its discipline, conform to its doctrines and mode of worship, and obey its laws and canons. If reason and conscience will not permit, the connection should be severed. 'The only remedy which a member of a voluntary association has when he is dissatisfied with the proceedings of the body with which he is connected, is to withdraw from it.'

"If we compel this spiritual court to observe the rule of law as to challenge of jurors, it would be our duty to enforce the observance of all the rules of law, unless of impossible application. With the same propriety it might be urged that twelve presbyters—the number of a jury—instead of three or five, should form the court. Why not go beyond the pale of the Church and abandon the presbyters as wholly incompetent? The canon, in the designation of presbyters as assessors, and the number, is no more emphatic than in providing the manner of selection. What law shall govern as to the number of witnesses necessary to establish an offense? Our law only requires one witness, with two exceptions; the Scriptural rule requires two. The injunction of St. Paul is, 'Against an elder receive not an accusation but before two or three witnesses.' The law under the old dispensation was, 'One witness shall not rise up against a man for any iniquity, or for any sin; at the mouth of two witnesses, or at the mouth of three witnesses, shall the matter be established.'

"We have no right, and therefore will not exercise the power, to dictate ecclesiastical law. We do not aspire to become *de facto* heads of the Church, and by construction or otherwise abrogate its canons and laws. We shall not inquire whether the alleged omission is any offense. This is a question of ecclesiastical cognizance. This is no forum for such adjudication. The Church should guard its own fold, enact and construe its own laws, enforce its own discipline, and thus will be maintained the boundary between the temporal and spiritual power."

domain of the Church, construe its canons and rules, dictate its discipline, and regulate its trials.

A discipline is necessary to the very existence of Church organization. The Church has the right, therefore, to make, enforce, and construe its own discipline. It is as much a delusion to confer religious liberty, without the right to make and enforce rules and regulations, as it is to establish and maintain a government with no power to punish offenders. The constitutions of the States guarantee the free exercise and enjoyment of religious faith, subject only to this restriction, as it is expressed in the Constitution of the State of Illinois, "that liberty shall not be construed into licentiousness, so as to authorize practices inconsistent with the peace and safety of the State." The boundary between the Church and State should be clearly marked out, and carefully observed, and maintained. It is well settled, that the civil courts may, and will, interfere where the rights of property or other civil rights are invaded; but it is equally well settled that the civil courts will not interfere to revise the decision of an ecclesiastical court upon ecclesiastical matters. In the case of the *Baptist Church* v. *Witherell*,[1] Chancellor Walworth said, "That over the Church, as such, the legal or temporal tribunals do not profess to have any jurisdiction whatever, except so far as it is necessary to protect it, or where it is necessary to protect the civil rights of others, and to preserve the public peace. All questions relating to the faith and practice of the Church and its members belong to the Church judiciary, to which they have voluntarily subjected themselves. But, as a general principle, those ecclesiastical judicatories can not interfere with the temporal concerns of the congregation or society with which the Church, or its members thereof, are connected." Christianity, though an essential element of conservation, and a great moral power in the State, should only work by love, and inscribe the law of liberty upon the heart. The civil government has no just or lawful authority over the conscience, or faith, or form of worship, or Church creed, or discipline, as long as their fruits neither undermine the civil supremacy, demoralize society, nor disturb its peace and security. The members of a Church unite with it with a full knowledge of its defined

[1] Page 296.

powers; and as the civil power can not interfere in matters of conscience, faith, or discipline, they must submit, however unjustly, to be canonically dealt with by their own adopted spiritual rulers.[1]

CHAPTER IX.

OFFENSES AGAINST THE CIVIL GOVERNMENT.

In another place we will treat of the obligation of a Church member to obey the civil law; but at present we shall confine the inquiry to offenses against the civil government, and how far they are cognizable before a Church tribunal. All offenses are reducible under one of two general heads. First, such as are *malum in se.* Second, such as are *malum prohibitum.* The first involves moral as well as legal guilt; that is, the act is wrong *per se;* not because it is prohibited by human authority, but because it is in violation of the natural or the revealed law of God. Human or civil government may prohibit the act, and declare what punishment shall be inflicted upon the offender, but the prohibition adds nothing to the moral guilt.

In this connection, we will allude to a question that has been variously considered, and has frequently agitated the public mind; that is, where the divine and human law come in conflict, which should be obeyed? Without hesitation we answer, that the divine or natural law should; and in this view we are supported by the great weight of Sir James Mackintosh, who says: "We are bound to disobey every human law which allows or enjoins us to commit a breach of the law of nature. A law contrary thereto would promote, and, if obeyed, would ever promote, the misery of man so long as he remains a being of the same nature with which he is at present endowed."

"The municipal law of a country is only made," says Stanhope, "for the common course of things, and can never be understood to have been designated to defeat the ends of all law. What would be the consequence of a nation submitting to a violation of all their natural and divine rights? The result would prove most disastrous."

[1] *The German Reformed Church* v. *Sibert,* 3 Barr, 291.

The language of the members of the House of Commons, in the celebrated Sacheverell case, is still stronger on this point; if the transgression of any given law against common right and the ends of just government be considerable in their nature, and spreading in their effects, as this objection goes to the root and the principle of the law, it renders it void in its obligatory qualities upon the mind. It can not be said, therefore, to have the property of genuine law, even in its imperfections and defects. Such a law, though made not virtually, but actually, by the people, not representatively but collectively, would be null and void; because it would be against the principles of a superior law, which it is not in the power of any community or the whole race of man to alter.[1]

In the debate on the Church Discipline Bill, in the House of Lords, July 26, 1833, the Bishop of Exeter said: "I speak solemnly, but I speak not in a spirit of defiance, when I say, that should this Bill pass, I shall not feel myself at liberty to obey its main instructions or directions. To other laws I will cheerfully conform, but this will be a law that strikes at the very root of the essential discipline of our Christian Church. I plainly and openly declare, that should this Bill pass, if a clergyman in any diocese conducts himself criminally, I shall call on that clergyman to answer me for his action; and, if he will not obey my remonstrances, I shall proceed to that sentence which this Bill tells me I shall not pass; I shall proceed to excommunicate him."

Mr. Justice Coleridge understands Blackstone to mean merely "That a human law against the law of nature has no binding force against the conscience; and that if a man submits to the penalty of disobedience he stands acquitted." That, however, is not the construction that we put upon the language of this celebrated law writer: for, says he, "In regard to such points as are not indifferent, human laws are only declaratory of an act in subordination to the former: to instance, in the case of murder, this is expressly forbidden by the divine and demonstrably by the natural law; and from these prohibitions arises the true unlawfulness of the crime. Those human laws that annex a penalty or punishment to them do not at all increase the moral guilt, or

[1] See Burke's Tract on Property Law.

superadd any fresh obligation *in foro conscientiæ* to abstain from its perpetration. Nay, if any human law should allow, or enjoin us to commit it, we are bound to transgress that human law, else we must offend both the natural and the divine law."[1]

The more difficult question is, Where there is a plain and manifest repugnance between human and divine law, how shall the human law be administered? should our courts treat it as they would a law infringing the Constitution of a State or general government? or should they, notwithstanding the infringement, proceed to its enforcement, and thereby, for all practical purposes, treat the law as one of binding obligation upon the court, although it is admitted that it is the duty of the subject not to obey?

This question is very ably considered by Chase, J., in delivering the opinion of the Supreme Court of the United States, in the case of *Colder* v. *Bull*,[2] where he said: "I can not subscribe to the omnipotence of the State Legislature, or that it is absolute and without control, although its authority should not be expressly restrained by the Constitution or fundamental law of the State. There are certain vital principles in our free, Republican government which will determine and overrule any apparent and flagrant abuse of legislative power, as to authorize manifest injustice by positive law, or to take away that security for personal liberty or private property, for the protection whereof the government was established. An Act of the Legislature (for I can not call it a law) contrary to the first great principles of the social compact can not be considered a rightful exercise of power."

Mr. Justice Story, with his great ability and his vast legal research, in speaking upon this subject held this language: "The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred; at least no court of justice in this country would be warranted in assuming that the power to violate and disregard them,—a power so repugnant to the common principles of justice and civil liberty,—lurked under any general grant of legislative authority, or ought to be inferred from any general expression of the people."[3]

The people ought not to be presumed to part with rights so

[1] 1 Blackstone, 42. [2] 3 Dall. 386. [3] *Wilkinson* v. *Leland*, 2 Peters, 627.

vital to their security without very strong and direct intention. It will be observed that the fair inference to be drawn from these authorities is, that there are certain restrictions on legislative action not to be found in the *Magna Charta* or State or Federal Constitutions. These restrictions grow out of certain great principles of right and justice in the delegation of power conferred by the people upon the government; and when an attempt is made to infringe these principles, it is the duty of the judiciary to arrest the law-making power. The question is one full of the greatest interest and fraught with difficulty, the difficulty arising not so much from the nature of the question as from the principle of its application; though with us abuses of this character need not be of long continuance if the virtue of the people can be aroused and directed to its repeal or overthrow. The history of this country's legislation is replete with instances of this species of odious enactments. The whole license system belongs to this class, and yet, for more than half a century, it has been tolerated by public opinion and silently acquiesced in by the Church, until streams of moral desolation have inundated the land, and victims are to be found in almost every household.

We have said that there are two classes of offenses, and have briefly spoken of those that are against natural right; it now remains to treat of those that are *malum prohibitum*, or such as are only wrong because they are prohibited either by the law of the land or the canons of the Church. The necessity for these prohibitions grows out of our social relations. If a man wanted to live in a state of nature, unconnected with other individuals—if such a condition were possible—there would be no occasion for any other law than the law of nature and the law of God; neither could any other law possibly exist, for law always supposes some superior to make it, and in a state of nature mankind is upon an equality, without any superior but Him who is the Author of our being; but as man was formed for society, he is neither capable of living alone, nor has he the courage to do it.

For this reason human law, for the benefit of society and the State, fixes rules upon a great number of different points or subjects upon which the laws of nature and of revelation are indifferent. Herein it is that human law has its greatest force and

efficacy; for with regard to such points as are not indifferent, human laws are only declaratory, as we have before said, and in subordination to the natural and revealed law. The question is often asked by members of the Church, Are human laws that are only *malum prohibitum* binding upon the conscience of the Christian, and are we equally bound to obey the one as the other? The answer is not free from difficulty; both are binding. Human law not in conflict with the divine is plainly enjoined in the Word of God. "Render unto Cæsar the things that are Cæsar's, and unto God the things that are God's," is the teaching of Him who spoke as never man spoke. If any additional authority is wanted, we have only to refer to the injunction of Paul where he says, "Let every soul be subject unto the higher powers; for there is no power but of God: the powers that be are ordained of God. Whosoever resisteth the power, resisteth the ordinance of God; for rulers are not a terror to good works, but to the evil." The distinction is not in the act of obedience so much as in the spirit with which we obey and the motive which prompts us to perform the act.

There is but one example of a theocratical form of government; and in that there is observable a distinctive feature, different from all human forms of government, and that is, all offenses committed against God or his moral government were more highly penal and visited with severer punishments than offenses merely against man. It is probable that to this fact the origin of the law of high treason is traceable, by which offenses against the government are made more highly penal than were offenses against the subject or individual; and if this is right—and we doubt not that it is—then crime or treason against the moral government of God should still continue to be so regarded, because he is the original source of power, whether spiritual or temporal, and his law is paramount authority.

It is not our design to enumerate, or to attempt to classify and define, the various offenses against the law of the Church cognizable before the judicial tribunals of the Church. Such a task does not fall within the scope of this work, neither is it practicable. Crimes are so various and so diversified that it is impossible to set boundaries to them. Almost every day we are startled by some new phase of crime, or by some unheard of

crime, defying the ingenuity of legislation to anticipate or to provide against. That, however, is an offense against the canons of the Church which is prohibited by or clearly contrary to the Word of God, or violative of the principles of his moral government, and as such is cognizable before the judicial tribunals of the Church, whose duty it is to hear and determine the same in accordance with the rules and usages of the Church, and render such decision or judgment as the Discipline prescribes, or where the Discipline is silent, then such judgment as is consistent with the usages and well-being of the Church.

CHAPTER X.

WHO ARE LIABLE TO BE DEALT WITH UNDER THE DISCIPLINARY RULES OF THE CHURCH.

It is a common fact, that while the idiot, the imbecile and the lunatic are denied the enjoyment of most of their civil rights, the Church, in her tenderness for the souls of men, has quietly left them in the possession of the privileges of Church fellowship and of becoming Church members, notwithstanding the essence of the act requires the deliberate and unbiased exercise of a rational will. This anomaly has arisen in Church polity from a natural jealousy of any attempt to encroach upon this most sacred right. There is, however, a discretion vested by the Discipline in the minister in charge, which protects the Church from any flagrant abuse. He may refuse to receive such an one either on probation or into full connection and fellowship with the Church. If, however, they are once received into full connection in the Church, a very difficult question arises as to how to deal with them for the violations of the rules and usages of the Church. The little indulgence shown to imbecility in criminal investigations sufficiently indicates either that the nature of the mind is very imperfectly understood, or the true ground of personal responsibility is either ignored or not very clearly perceived. In considering this question it is well to remark that our moral and intellectual constitution is constructed so as to bring it into harmony with the external world upon which it acts and by which it is acted upon.

The result of this action is the happiness and spiritual advancement of spiritual beings endowed with power to perform the part allotted to them and placed in a situation suitable for the exercise and development of their intellectual powers. They become accountable for the manner in which those powers are used towards their Maker under all circumstances and to their fellow-men when the institutions of society are injured. All legal liability or accountability is founded on this principle of adaptation, and whenever either of its elements is taken away, moral accountability is at an end. The intellect must not only be sufficiently developed to acquaint the individual with the existence of external objects and with the source of their relations to him, but the moral power must be sound enough and strong enough to furnish each its specific incentive to pursue that course of conduct which his intellect has already approved. It is not enough that the mind is competent to discern some of the most ordinary relations of things in order to accountability. The mind must be sensible of the impropriety of the act; for so long as the individual is incapable, by reason of defects of constitution, of feeling the influence of those hopes and fears and of all those sentiments and affections which man naturally possesses, an essential element of legal responsibility is wanting, and he is not accountable for his action. The idea of crime is associated with those of injury and wrong committed by an individual in possession of a mind in its normal condition. Should we then impute crime where there is neither intention nor consciousness of wrong, and where the fear of punishment can not restrain such a one because his intellect can discern no necessary connection between the crime and the penalty attached to it, even if he were aware of the existence of the penalty?

CHAPTER XI.

MOTIVE OR INTENT.

THE consideration of this question must tend to throw light upon what we have heretofore said, when treating of mental capacity sufficient to render the individual an accountable being, and thereby a fit subject of punishment. The rule is

clearly stated, in Bishop on Criminal Law,[1] "That there is only one criterion by which the guilt of a man is to be tested. It is whether the mind acts with criminal intent; for neither in philosophical relation, nor in religious nor moral sentiment, would any people in any age allow that a man should be deemed guilty unless his mind concurred. It is, therefore, a principle of our legal system, that the evidence of every crime is the wrongful intent. The act itself does not make a man guilty unless his intention accompanied the act." Therefore, an act done by one against his will is not his act.

This view of the question readily leads to another, which is, that in determining whether a particular thing is or should be made the subject of inquiry, cognizable by our criminal law, we do not, in our civil tribunals, look merely at the morals of the matter, or even at the enormity of the evil sought to be remedied; but we look at the question, primarily, as one of governmental judgment, taking into consideration whether to punish the evil doer, as a rule, promotes the public peace and good order of society. And these are considerations to be taken into account in Church trials and investigations. The Church, as organized, supplies the deficiencies of the civil government (consequent upon the universality of its rules and its secular offices), and deals more immediately and directly with the conscience. It gives greater heed to the moral and spiritual state of its members, and therefore takes notice of offenses, and treats certain things as offenses against the law of the Church that are not so regarded by the municipal law of the State.

CHAPTER XII.

IGNORANCE — HOW FAR AN EXCUSE.

THERE are two kinds of ignorance recognized by the law: first, ignorance of law; second, ignorance of fact. The former falls within the old Roman maxim, *ignorantia juris non excusat*, that is, that ignorance of the law is no excuse for crime. It is a legal presumption, conclusive in its character, that every man knows the law. This presumption is founded on public policy;

[1] 1 Bishop, 370.

it should never, however, be extended beyond its true foundation; though it may be difficult to determine, from the authorities, how far the foundation of the policy extends. Yet we may safely lay down the doctrine, that no person, in either a civil or criminal proceeding, can defend himself under the naked plea, that when he did the thing complained of he did not know of the existence of the law he violated. This rule, so essential to the ordinary administration of justice, can not be deemed harsh, even in criminal cases; and especially so of offenses that are *malum in se;* even if the offender does not know that the act is prohibited by the law of the land, he, at least, knows in his conscience that he is violating the law of God; and he has little cause to complain when visited in this world by the merited punishment which he had desired to postpone until the next. The principle of this rule is as applicable to Church investigation as it is to trials in our courts of law. This is more especially true since books have become so common, and Church discipline, and Church history accessible to all.

Ignorance of fact stands, in both civil and criminal law, on an entirely different basis, the maxim being *ignorantia facti excusat*—ignorance or mistake of fact in all cases of supposed offense constitutes a sufficient excuse; we have said, in all cases of supposed offense, being careful to distinguish between public wrongs and private rights, where the claim is based upon a demand for the simple reparation for the private loss or injury. It is deemed just and reasonable, as we have before stated, independent of any question of intent, that he who occasions a civil injury should make it good. The wrongful intent being the essence of every crime, it follows that where a man is misled without his own fault, or carelessness, concerning facts; and when so misled, acts as he would be justified in doing by the facts such as he believed them to be, is legally innocent, the same as he is morally innocent. The rule is well stated by Dr. Wayland, "That if a man knows not the relation he sustains to others, and has not the means of knowing, then he is guiltless. If he knew them, or had the means of knowing them, then he is guilty." This rule must necessarily form the basis of every religious system.

There is but a slight distinction, except in degree, between a willful wrong, and indifference whether wrong be done or not, if

wrong actually ensues from such indifference. On this ground, carelessness is criminal in many cases, and supplies the direct criminal intent. Thus, for illustration, if one has an ox he knows to be dangerous, and in the habit of attacking persons or animals, and he permits or suffers him to go at large, and the ox does mischief, the owner is liable; or if the ox kills a person, the owner is indictable for manslaughter. So, also, one selling intoxicating drinks, upon the same principle, is liable criminally for disorderly conduct resulting from the drinking of the liquor. So, also, if a person sets fire to a building so close to another as to endanger the latter, and the latter is burned, the act of setting fire to the former is deemed, in law, to be the burning of the latter,[1] while the general principle is, that carelessness, sufficient in degree, is to be regarded in the law as criminal; still it will not always stand instead of the positive intent. There are crimes that require a concurrence of the will in order to constitute them crimes. In respect to offenses of this character, general carelessness is not sufficient. For illustration: a charge of larceny, which requires an intent to steal, could not be based on a mere careless taking of another's goods. It follows, from what has already been said, that judicial or civil tribunals do not always take jurisdiction of all wrongs. Neither is it possible for Church tribunals to do so, without disregarding all general rules, and leaving the matter to the conscience of the tribunal before which the accused may happen to be tried.

CHAPTER XIII.

INTENDED RESULT.

THE law holds every person responsible for the intended result of his acts, or, in other words, for the legitimate consequences of the act. It often happens that the result of human action is different from what the doer of it intended. If the motive is good, the rule, both of morals and of law, excuses the doer. Upon the other hand, if a man designs ill, but unintentionally thé act results in good, he is nevertheless morally guilty; and, within certain limits, the law holds him legally guilty. We

[1] *Gage* v. *Shelton*, 3 Rich. 242.

meet this difficulty, however, in the application of this principle, that to constitute a legal crime the evil intent must have produced an evil act. But, in order to constitute the crime, it is necessary that the act be evil in consequence of the evil mind from which it emanated. Every act producing an unintended result should be measured either by the intent or the result. The criminal law measures it by the latter, holding the person guilty of the thing done, where, in the doing of it, there is a legal wrong intended, the same as though the act done was specifically intended, though not always guilty in the same degree. Where one has fully entertained a criminal purpose, he should be treated, so far as from the nature of the case he is capable of being so treated, as having done the thing, so far as the moral and religious aspects of the case are concerned. Anciently the will was taken for the deed in matters of felony; although the rule is now changed or modified, it is still an offense. Evidently the party can not complain if he is punished for the intention. But society has no interest in interfering until it is injured by an act com mitted by one of its members; therefore, when society punishes one of its members for the injury he has done, such member is not wronged, unless his act is greater than his intent.

CHAPTER XIV.

WHO ARE AMENABLE TO THE JURISDICTION OF THE CHURCH.

We have previously considered some of the classes that are not amenable to the jurisdiction of the Church, and in this connection we will add that in the United States persons who are not members of the Church are not liable to be dealt with canonically for the commission of any offense. It is not considered that the offense of any such persons is an offense against the Church. Under the laws of England the contrary is the fact, owing to the relation existing between the Church of England and the civil government. In this country the test of jurisdiction is membership, or authority over the person of the offender. In England the test of jurisdiction is over the subject matter. Temporal matters are cognizable in England in the temporal or civil courts. Ecclesiastical matters are cognizable without any

reference to membership, and are reducible under three general heads: First, pecuniary causes; second, matrimonial causes; third, testamentary causes. Pecuniary causes cognizable by the ecclesiastical courts are such as arise either from withholding ecclesiastical dues or doing or neglecting to do some act relating to the Church whereby some damage resulted to the plaintiff, and to obtain satisfaction for such damage he was allowed to institute suit in the ecclesiastical or spiritual courts. The principal of these is the subtraction or withholding of tithes from the parson or vicar, whether the former be a clergyman or a lay proprietor. This right, however, only existed between the spiritual man and the layman to compel the payment of them when the right was not disputed.

Matrimonial causes, or injuries respecting the right of marriage, was a branch of ecclesiastical jurisdiction far less disputed, though if marriage is to be considered in the light of a civil contract, it would not seem to be of spiritual cognizance. One of the first and principal matrimonial causes was when one of the parties gave out that he or she was married to the other, whereby a common reportation of their marriage was established. Upon this ground the party injured might libel the other in the spiritual courts, unless the defendant undertakes to make out proof of actual marriage.

Suits for the restitution of conjugal rights were another species of matrimonial causes, which were brought when either husband or wife was guilty of living separate from the other without any sufficient reason, in which case the ecclesiastical jurisdiction of England compelled them to come together again, if either party was weak enough to desire it contrary to the inclination of the other. Divorces were cognizable by the ecclesiastical judges.

Testamentary causes also belong to the ecclesiastical or spiritual jurisdiction, having been transferred to the Church by the favor of the Crown, which at first blush would seem as though they are certainly of a mere temporal nature.

The points in which these jurisdictions are the most defective are those for the enforcement of their sentences when pronounced,[1]

[1] Joseph Guibord, a lay Roman Catholic parishioner of Montreal, on the 18th of November, 1869, died a member of the *Institute Canadien*, a literary society which had incurred ecclesiastical censures. In his life-time a pastoral

for they have no other power of enforcement but that of excommunication from the Church of England. The power in this penalty is, that it is followed up by certain disabilities imposed by law upon a person under such sentence. He can not serve

letter of the Bishop of Montreal had forbidden such membership on pain of being deprived of the sacrament "*même à l'article de la mort.*" During illness, the priest who administered unction had refused to administer holy communion, and at his death six years thereafter, the *curé* of Montreal, under the direction of the bishop, refused "*la sépulture ecclesiastique,*" after request duly made in that behalf; that is to say, the said *curé* refused burial in the larger part of the local cemetery in which Roman Catholics are generally buried with the rites of the Church and in which the graves are consecrated, but he offered burial without rites in the smaller or reserved part, in which the graves are never consecrated and in which are buried unbaptized infants, criminals, and those who have died "*sans les secours ou les sacrements de l'église.*" This proposal was rejected, though Guibord's widow offered to accept burial in the larger part without religious services.

On a petition by Guibord's widow for a mandamus to the respondents upon receipt of the customary fees to bury Guibord's body in the said cemetery conformably to usage and law and to enter such burial in the civil register, a writ of mandamus was issued by the Superior Court which, in substance, called upon the respondents to show cause why a writ of mandamus should not be issued. Thereupon the respondents petitioned *inter alia* that the writ being of summons and not of mandamus, might be annulled for irregularity, traversed the plaintiff's petition, and pleaded, first, the irregularity above mentioned; secondly, that they had not refused, but had offered such burial as Guibord was entitled to; thirdly, that they were legal proprietors of the cemetery, free from civil interference and control as respects the service of religion and the exercise of its ceremonies, and were legally entitled to point out the precise spot in the cemetery where each burial was to be made; that they were also civil officers within certain limits, and civilly responsible in that capacity only; that they had offered such burial and refused nothing but ecclesiastical burial on the ground that Guibord had been for ten years previous to his death "notoriously and publicly subject to canonical penalties" resulting from the before mentioned membership and at the direction of the proper ecclesiastical authorities. They further, in replication to the plaintiff's answer, denied that the civil courts could examine the grounds of refusing ecclesiastical burial, which they nevertheless specified, averring that in consequence of the premises Guibord must be considered "*un pêcheur public,*" and as such deprived of ecclesiastical burial by the Roman Catholic ritual.

Held, firstly, that the writ of summons was in proper form according to the code of procedure in Canada; secondly, that Guibord never having been excommunicated *nominatim*, and never having been proved or adjudged to be "*un pêcheur public*" within the meaning of the Quebec ritual, was not, at the time of his death, under any such valid ecclesiastical sentence or censure as would, according to the Quebec ritual or any law binding upon Roman Catholics in

upon juries; he can not be a witness in any court, nor can he bring an action or suit at law; finally, if within forty days after such sentence has been published in the Church he does not submit and abide by the sentence of the spiritual court, the bishop may certify such contempt to the Court of Chancery and he may

Canada, justify the denial of ecclesiastical sepulture to his remains; thirdly, that the respondents, who were sued in their corporate capacity as holders of land and administrators of the cemetery, were bound to give to Guibord's remains burial in the larger part of the cemetery on payment of the accustomed fees, and that a peremptory writ of mandamus should be issued accordingly.

Quere—Whether their lordships would have power in a suit properly framed for that purpose to order the performance of the usual religious rites?

Although the Roman Catholic Church in Canada may, on the conquest in 1762, have ceased to be an established Church in the full sense of the term, it nevertheless continued to be a Church recognized by the State, retaining its endowments and continuing to have certain rights (for example, the perception of *dimes* from its members) enforceable at law.

Although the civil courts in Canada may not be competent to entertain a suit in the nature of the "*appel comme d'abus*," yet the jurisprudence and precedents relating to such a suit may be considered as evidencing the law of the Roman Catholic Church in Canada.

Long v. *The Bishop of Capetown*, approved. Even if the Roman Catholic Church in Canada were to be regarded merely as a private and voluntary religious society, resting only upon a consensual basis, courts of justice are still bound, when due complaint is made that a member of the society has been injured as to his rights in any matter of a mixed spiritual and temporal character, to inquire into the laws and rules of the tribunal or authority which has inflicted the alleged injury, and to ascertain whether the act complained of was in accordance with the law and rules and discipline of the Roman Catholic Church which obtain in Lower Canada, and whether the sentence, if any, by which it is sought to be justified was regularly pronounced by competent authority.

Semble—The ecclesiastical law which now governs Roman Catholics in Lower Canada must be taken to be identical with that which governed the French Province of Quebec, except so far as modifications are proved to have been introduced by valid consensual contract.

Their lordships approved the refusal by the Court of Queen's Bench to receive a petition of recusation against the judges, alleging that they acknowledged the Roman authority and were thereby disqualified to try whether the civil power can entertain an "*appel comme d'abus*."

In the matter of Stephen Girard's remains (5 Penn. Law Jour. Rep. 684 Am. Law Jour. 97), the remains of Stephen Girard, after being interred, were exhumed by the authorities of Philadelphia with a design to deposit them with imposing public ceremonies at the Girard College. On the motion by the executors for a preliminary injunction to restrain such action by the city authorities and to compel them to restore the body to its former place of burial, the Court said, *In re* King (5 Penn. Law Jour. Rep. pp. 73–4):

be imprisoned by the sheriff until he becomes reconciled to the Church and such reconciliation certified by the bishop.

This notice of the jurisdiction of the spiritual authority of the Church of England will, perhaps, enable the reader to form a more accurate idea of the jurisdiction exercised over its members by the Methodist Episcopal Church. Four important items

"The question involved in the case was of more than ordinary interest. No analogous case could be found in the English or American annals. Is there not that in our laws which guarantees the security of sepulcher? If any person in mere wantonness should break into the grave and take away the body, the criminal law would furnish a remedy, and it would even act in a preventive manner. In cases like the present, however, the law has furnished no remedy.

"It is proper, therefore, that a Court of Chancery should provide a remedy. Where a person was buried in a common burying ground where the title did not pass, the *law* did not furnish a remedy in reference to a removal, but a Chancellor would intervene to prevent the desecration of the grave, otherwise bloodshed and violence would be the consequence. If I had been applied to before the removal of the body, I would have interfered. But this is not the case here. The city claims as the residuary legatee, and her motive was to indicate respect and honor for the memory of the man.

"If the executors chose to disclaim it they might have done so if they were executors, but if they disclaimed the relatives might be parties alone. In all these respects a court of equity could interfere. But the body has been removed and the relatives had a knowledge of it. Even here the court can interfere; but ordering the body back to its former place would be deciding the case. We are not asked to do this now. It would be deciding the case before a hearing. This a court never does in granting an injunction. The body must be placed temporarily in some respectable resting place. Where so proper a place as in the sarcophagus at Girard College instead of the garret where it now is? The final decision of this case, from its nature, can not be given under six or nine months, and then an appeal lies to the Supreme Court. How much better, then, to have it deposited in the place contemplated than to have it a weight upon the community. This appears to have been agreed upon by both parties. The difficulty, however, appears to be about the ceremony. Some persons must deposit the body as it is to be deposited, and what difference does it make whether few or many attend the ceremony, or whether the Masons or any other body attend? No religious ceremonies are in contemplation. He would, therefore, refuse the special injunction to the extent prayed for, and suffer the city to proceed to inter the body temporarily, until its final resting place should be determined by the Court."

It is true, the case is but a *nisi prius* case and was hastily decided. The Court, however, held: first, as a court of equity it could and did control the disposition of the body and who should have the control and burial thereof; second, that in the absence of executors, as where there were none, or there being executors they disclaim all connection with the suit, the Court would proceed upon the application of the relatives alone. *In re* Bettison, 12 Moak 664–668, 669.

are to be taken into account in considering the causes that have combined to limit her jurisdiction: First, the separation of the Methodist Church from the Church of England; second, the separation of the Church from the civil government; third, the express renunciation by the Church of all jurisdiction over matters of a purely temporal character; fourth, by restricting the jurisdiction to canonical offenses committed by its own membership.

From what has been previously said, it is plainly inferable that the right to try an offender is limited to such members as are in full connection with the Church, or to such persons as are recognized by the Church as sustaining that relation. Hence a mere probationer can not be tried by the Church, not having entered into the covenant relation of the Church nor having assumed any of its obligations. He can not be arraigned for any cause, because he is not yet within the jurisdiction of the Church, nor can he be tried till he has served out his six months' probation. At the end of six months, the probationary period fixed by the Discipline, he may be admitted to membership, and when admitted in pursuance of his wish, either expressed or implied, he voluntarily assumes all the obligations of membership. The relation of a member in full fellowship with the Church is a covenant relation, and as such, it is the foundation of the jurisdiction of the Church over the member. Whenever a person unites with a society of any kind, there is an implied undertaking on his part to observe and obey the rules of such society or Church, and if he violates them, then he must submit to the penalty imposed by the society or Church. For this reason none can claim the right of withdrawal from the Church except in compliance with its usage. A member has no right of withdrawal while charges are pending against him, unless by the consent of the Church, until the charges have been withdrawn or investigated and he has been declared innocent. Such, at least, is the usual construction of the Discipline of the Methodist Episcopal Church by the chief administrators. And this, without doubt, is the correct construction, especially in cases where the charges involve grave crime or gross or scandalous offenses. Under such circumstances the guilty party should not be allowed to evade the authority of the Church by

withdrawing from its jurisdiction. It is, however, a matter of discretion, but that discretion should always be soundly and cautiously exercised with reference to the good resulting to the individual and the Church. While mercy should be clearly manifested in all the deliberations of the Church, its moral and religious influence must be carefully preserved.

PART SECOND.

CHURCH GOVERNMENT.

CHAPTER I.

THE GOVERNMENT OF THE METHODIST EPISCOPAL CHURCH.

THE governmental power of the Church is vested in a General Conference, Annual Conferences, District Conferences, Quarterly Conferences, Bishops, Presiding Elders of districts, and Preachers in charge of a circuit or station.

The power, jurisdiction, and authority of each is defined by the Discipline and usages of the Church, and which we will now treat of in their order.

CHAPTER II.

THE GENERAL CONFERENCE.

THE General Conference is composed of ministerial and lay delegates. The ministerial delegates consist of one member for every forty-five members of each annual conference, and are selected by the annual conference by appointment, either by seniority or choice (which we presume means an election), at the discretion of the annual conference. No person shall be eligible to the office of ministerial delegate who shall not have traveled four calendar years from the time he was received on trial by an annual conference, and is at the time of his election or appointment in full connection with the conference appointing him.

The lay delegates shall consist of two laymen for each annual conference, except where a conference is entitled to only one ministerial delegate; such conferences shall be entitled to but one lay delegate. The lay delegates are required to be chosen by an electoral conference of laymen, assembled for that purpose on the third day of the session of the annual conference, at the

place of its meeting; such electoral conference to be held at the session of the annual conference immediately preceding the General Conference.

The Discipline provides that the General Conference shall meet on the first day of May, in the year of our Lord 1812, in the city of New York, and thenceforward on the first day of May, once in four years, perpetually, in such place or places as shall be fixed by the General Conference from time to time.

The general superintendents, or a majority of them, by or with the advice of two-thirds of all the annual conferences, shall have power to call an extra session of the General Conference at any time, to be constituted in the usual way.

When the General Conference is convened in session, it requires two-thirds of the whole number of ministerial and lay delegates to form a quorum for the transaction of business. The ministerial and lay delegates sit and deliberate together as one body; but they vote separately "whenever such separate vote shall be demanded by one-third of either order; and, in such cases, the concurrent vote of both orders shall be necessary to complete an action." That is, that it shall require a majority of both lay and ministerial delegates to the passage of any law, rule, or regulation for the government of the Church, or to the election of its officers. The General Conference, when convened, shall be presided over by one of the bishops, or superintendents; but in case no general superintendent or bishop be present, the conference shall choose a President *pro tem.*

The powers of the General Conference are unlimited over all matters pertinent to Church government, subject to the following limitations and restrictions: namely,

"§ 1. The General Conference shall not revoke, alter, or change our Articles of Religion, nor establish any new standards or rules of doctrine contrary to our present existing and established standards of doctrines.

"§ 2. They shall not allow of more than one ministerial representative for every fourteen members of the annual conference, nor allow of a less number than one for every forty-five, nor more than two lay delegates for any annual conference; *provided*, nevertheless, that when there shall be in any annual conference a fraction of two-thirds the number which shall be fixed for the ratio of representation, such annual conference shall be entitled to an additional delegate for such fraction; and, *provided* also that no conference shall be denied the privilege of one delegate.

"§ 3. They shall not change or alter any part or rule of our government,

so as to do away Episcopacy, or destroy the plan of our itinerant general superintendency; but may appoint a missionary bishop or superintendent for any of our foreign missions, limiting his jurisdiction to the same, respectively.

"§ 4. They shall not revoke or change the General Rules of the united societies.

"§ 5. They shall not do away the privileges of our ministers or preachers, of trial by a Committee, and of an appeal; neither shall they do away the privileges of our members, of trial before the society, or by a Committee, and of an appeal.

"§ 6. They shall not appropriate the produce of the Book Concern, nor of the Charter Fund, to any purpose other than for the benefit of the traveling, supernumerary, superannuated, and worn-out preachers, their wives, widows, and children."

"¶ 71. *Provided*, nevertheless, that upon the concurrent recommendation of three-fourths of all the members of the several annual conferences, who shall be present and vote on such recommendation, then a majority of two-thirds of the General Conference succeeding shall suffice to alter any of the above restrictions, excepting the First Article; and also whenever such alteration or alterations shall have been first recommended by two-thirds of the General Conference, so soon as three-fourths of the members of all the annual conferences shall have concurred as aforesaid, such alteration or alterations shall take effect."

By reference to the preceding sections of the Discipline, it will be seen that there is no formal distribution of power — such as is usually found under the organic laws of our national and State governments — into executive, legislative, and judicial departments. The General Conference, however, under that provision of the Discipline clothing it with authority to make rules and regulations for the government of the Church, may provide for such a distribution of power. And while there is no formal distribution of power, it does not follow that the distinction existing between the exercise of executive, legislative, and judicial power is not substantial, and one to be kept constantly in view.[1]

[1] Thus, for illustration, ¶ 240 of the Discipline provides that the General Conference shall carefully review the decisions of law contained in the records and documents transmitted to it from the judicial conference; and, in case of serious error therein, shall take such action as justice requires. It will not be controverted, that the determination contemplated by this paragraph of the Discipline is a judicial one; and being a judicial one, that the decision must be made by the General Conference in accordance with the canons of the Church in force at the time that the decision of the judicial conference was made. The General Conference, while sitting judicially, can not exercise its legislative function so as to change the Discipline with reference to judicial conferences, and then apply the Discipline, as changed, to the case on hearing by the General Conference, from the judicial conference.

The legislative power of the General Conference is the law-making power of the Church. And this leads us to inquire, what is a law? In the commencement we have given Blackstone's definition of the term; but here we will attempt a further definition of it, as applicable to the Church. It is a rule of universal application as contradistinguished from a sentence or a decree. It operates on all classes, that are amenable to it, equally, and ordinarily it is a rule of prospective application, and should never be made, as we have previously shown, in opposition to the principles of natural justice; a law can not be made to determine private rights, or to decide private controversies; the exercise of such powers, while they are within the jurisdiction conferred upon the General Conference, belong to the judicial department of the Church.

The French Code, by a formal and express provision, prohibited all retrospective legislation, and the principle upon which such prohibition was founded is generally admitted to be correct. But no such universal restriction would answer with us, for in our civil legislation we are constantly passing laws of a retrospective character, and such laws have been upheld and enforced within certain limits.[1]

[1] If by an *ex post facto* law are intended all retrospective statutes as well in relation to civil as criminal matters then this Court ought to pronounce the law in question nugatory, as being against the prohibition in the Constitution of the United States. But I do not think the definition of an *ex post facto* law can be extended beyond criminal matters. Such laws are only intended to subject the citizen to punishment for an act done before the existence of the law and declared criminal by such subsequent statute, or, according to Justice Blackstone, in his Commentaries, when after an action (and different in itself) is committed, the Legislature for the first time declares it to have been a crime and inflicts a punishment on the person who has committed it. *Dash* v. *Vankleeck*, 7 John. 482.

As to the first point, it is clear that this Court has no right to pronounce an act of the State Legislature void, as contrary to the Constitution of the United States, from the mere fact that it divests antecedent vested rights of property. The Constitution of the United States does not prohibit the State from passing retrospective laws generally, but only *ex post facto* laws. Now it has been solemnly settled by this Court, that the phrase "*ex post facto* laws" is not applicable to civil laws, but to penal and criminal laws, which punish no party for acts done which were not punishable at all, or not punishable to the extent or in the manner prescribed. In short, *ex post facto* laws relate to penal and criminal proceedings which impose punishments or forfeitures, and not to civil pro-

By the constitutional provisions generally adopted by the States, private property can be taken for public uses on certain terms, but can not be taken for private uses. It is the province of the legislative department of the government to determine, under this provision of the Constitution, the rules of compensation that shall be paid for private property taken for public use under the law of eminent domain; but the Legislature in the exercise of such power can not encroach on the judicial department, as it is the province of that department to determine, not upon the rules for compensation, but upon the compensation under those rules fixed by legislative authority, the right to take the property of the individual and the amount of compensation to be paid such individual for the property so taken; thus distinguishing a law from a sentence, judgment, or decree.

Authorities are not wanting that hold that a Legislature has no judicial powers and can not, on any pretense, interpose its authority respecting questions of interpretation pending in the courts.[1]

We shall, therefore, in considering the distribution of powers exercised by the bishops and by the General Conference, as far as the same falls within the scope of this treatise, consider them distinct, and proceed to call attention, not to the executive powers of the bishops, nor to their ministerial duties as superintendents of the Church, any further than such executive and ministerial powers are connected with the duties of the General Conference while sitting in a judicial capacity. The bishops by virtue of their office are *ex officio* Presidents of the General Conference; but the whole body of the bishops are not required to preside over a General Conference; on the contrary, by the ex-

ceedings which affect private rights retrospectively. The cases of *Calder* v. *Bull*, 3 Dall. 386., 1 Cond. Rep. 172.; *Fletcher* v. *Peck*, 6 Cranch, 87; *Ogden* v. *Sanders*, 12 Wheat. 266; *Satterlee* v. *Matthewson*, 2 Peters 380, fully recognize this doctrine. *Whatson* v. *Mercer*, 11 Curtis 40.

The provision of the Constitution of the United States under which the preceding decisions were made is as follows, namely: "No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts; or grant any title of nobility."

[1] *The People* v. *the Supervisors of New York*, 16 N. Y. 432.

press provision of the Discipline as well as by usage of the Church, a single bishop shall preside when the Conference is in session, and they may alternate with each other accordingly, so as to suit their pleasure or convenience. The bishop while so presiding is clothed with the entire executive administration of the Conference and of the Discipline, restricted and guided, however, by such rules and regulations as may be adopted from time to time by the General Conference for its government. Each General Conference has power to adopt its own rules and regulations, and when so adopted it becomes the duty of the general superintendent presiding to enforce them; and in case of a disagreement in the application of those rules between the general superintendent and the Conference, an appeal lies in the manner prescribed by the rules and regulations of the Conference from the decision of the general superintendent to the Conference, and the decision of the General Conference on such appeal, in accordance with the rules and regulations adopted, is final.

The General Conference is the supreme judicial body of the Church. From its organization until 1872 it had original jurisdiction in the trial of accused bishops, and appellate jurisdiction in the trial of traveling preachers, and authority to fully determine all questions of law arising in the judicial administration of the Church. Up to and including the General Conference of 1856, its judicial powers were exercised by the whole Conference while sitting in its judicial capacity. In 1856 it was provided that thereafter the General Conference might try appeals from members of annual conferences who may have been suspended, expelled, or located without their consent, by a committee embracing not less than fifteen of its members, nor more than one from each delegation, which committee, in the presence of a bishop presiding, had full power to hear and determine the case. Thenceforward such appeals were always tried by such a committee. In 1872 this provision was superseded by one creating a judicial conference for the trial of appeals.

The General Conference has now original jurisdiction[1] over

[1] Jurisdiction is a power legally conferred upon a judge, magistrate, or other person to take cognizance of and decide causes according to law, and to carry the sentence into execution. In the matter of Ferguson, 9 John. 241.

The tract of land or district within which a judge or magistrate has juris-

but one class of cases, namely, over the trial of a bishop accused of maladministration. Its judicial authority in all other cases is of an appellate nature. In the appeal of a bishop from a judicial conference, the General Conference must pass upon the question of his guilt or innocence; but in other cases it sits not so much to pass upon the guilt or innocence of the accused, only as it may happen to be incidentally involved, but to inquire into the regularity of the proceedings of some inferior judicial tribunal of the Church, such as an annual conference or a judicial conference, or the decision of a bishop made in such conference, for the purpose of correcting and revising any errors or improper rulings that may have been made by such inferior tribunal and certified in its record.

diction is called his territory, and his power in relation to his territory is called his territorial jurisdiction.

Every act of jurisdiction exercised by a judge without his territory, either by pronouncing sentence or carrying it into execution, is null and void. An inferior court has no jurisdiction beyond what is expressly delegated. 1 Salk. 404, note Gilb. C. P. 188; 1 Saund. 73; 2 Lord Raym. 1311.

Jurisdiction is original when it is conferred on the court in the first instance, which is called original jurisdiction; or it is appellate, which is when an appeal is given from the judgment of another court. Jurisdiction is also civil where the subject matter to be tried is not of a criminal nature; or criminal, where the court is to punish crimes. Some courts and magistrates have both civil and criminal jurisdiction. Jurisdiction is also concurrent, exclusive, or assistant. Concurrent jurisdiction is that which may be entertained by several courts. It is a rule that in cases of concurrent jurisdiction that which is first seized of the case shall try it to the exclusion of the other. Exclusive jurisdiction is that which has alone the power to try or determine the suit, action, or matter in dispute. Assistant jurisdiction is that which is afforded by a Court of Chancery in aid of a Court of Law, as, for example, by a bill of discovery, by the examination of witnesses, *de bene esse*, or out of the jurisdiction of the court, by the perpetuation of the testimony of witnesses, and the like.

It is the law which gives jurisdiction over the subject matter, and the consent of parties can not, therefore, confer it in a matter which the law excludes, nor can the want of it be waived; but when the law confers upon the court original jurisdiction of the subject matter, full appearance without objection confers upon the court jurisdiction of the person, and it may be adjudicated. *Hayes* v. *Cadwell*, 5 Gilman, 33; *People* v. *Scotes*, 3 Scam. 353; *Williams* v. *Blankenship*, 12 Ills. 122; 3 M'Cord 280; 1 J. J. Marsh. 476. Courts of inferior jurisdiction must act within their jurisdiction, and so it must appear upon the record, *Williams* v. *Blunt*, 2 Mass. 213; *Kempe's Lessee* v. *Kennedy*, 2 Curtis 224; but the Legislature may, by a general or special law, provide otherwise. Bouvier's Dictionary, page 683.

There are three classes of cases that come within the appellate jurisdiction of the General Conference: First, to review an appeal from the decision of a bishop on a question of law decided by such bishop during the trial of a cause pending in an annual or judicial conference; Second, to review the findings and determination of a judicial conference in the case of a bishop accused of immoral or imprudent conduct; Third, to review on appeal from a conference outside of the territorial limits of the United States a case heard and decided by such conference.

Where the appeal comes up from a conference beyond the territorial limits of the United States to the General Conference, its appellate jurisdiction is not exclusive, but concurrent with the judicial conference called by a bishop to meet at or near New York in accordance with the provisions of ¶ 241 of the Discipline.

CHAPTER III.

THE JUDICIAL CONFERENCE.

THE Discipline provides for a judicial conference, that shall have appellate jurisdiction in cases of appeals taken by traveling ministers or preachers from the decision of an annual conference. The judicial conference shall be composed of not more than twenty-one nor less than thirteen elders, of experience and sound judgment in the affairs of the Church. The several annual conferences in the United States shall, at each session of such annual conference, select seven; and when notice of an appeal is given to the President of an annual conference, he shall proceed, with due regard to the wishes and rights of the appellant, to designate three conferences conveniently near that from which the appeal is taken; and when so designated, the seven elders, selected by the annual conference as above mentioned from the three conferences designated by the President of an annual conference, shall constitute a judicial conference; and the bishop or President of such annual conference shall fix the time and place of its sessions, and give notice thereof to all concerned. From the language of ¶ 235 of the Discipline, it appears that the annual conference, from whose decision the appeal is taken, should not be included in the three conferences designated by the President of such annual conference. There is great propriety, aside

from the language of the Discipline, in giving to this paragraph such a construction; for the reason that the seven elders, selected by such annual conference, may have, upon the trial of such traveling minister or preacher, taken part in the decision appealed from.

Judicial conferences, thus constituted, are clothed with no original jurisdiction whatever: they are designated in the Discipline as "triers of appeals." Their jurisdiction is special, limited, and appellate; they have no authority to try a party accused of an offense against the canons of the Church until he has been previously tried and convicted by an annual conference. An appeal will not lie from a mere interlocutory finding of the annual conference, or of the select number of the annual conference. It is not enough, to authorize an appeal from an annual to a judicial conference, that the traveling minister or preacher should have been found guilty by such annual conference, or by the select number of such annual conference. Such annual conference, or committee, must proceed, in accordance with the finding, to pronounce sentence; for until this is done the case is still pending before such annual conference, or committee, and no appeal is authorized to be taken to the judicial conference until the case is finally disposed of by the annual conference,[1] neither has the judicial conference authority to hear an appeal, unless the same has been taken by a traveling minister or preacher in full connection with the Church. Hence, an appeal will not lie from the annual to the judicial conference where the appellant is a preacher on trial, or a local preacher.

Where there are several appeals taken from the same annual conference, or from adjacent annual conferences, but not from either of the conferences from which the triers of appeals are taken, and the time and place fixed by the President of the conference is such that they can all be heard before the same judicial conference, and the same judicial conference is designated by the President of the annual conferences, respectively, from which

[1] It is well settled that an appeal, or writ of error, will not lie from an interlocutory order. It must be a final adjudication, or judgment, to enable the party to have it reviewed by an appellate court. A party can not bring his case from a court of original jurisdiction to an appellate court by piecemeal. *Pentecost* v. *Magahee*, 4 Scam. 326. *Fleece* v. *Bussell, et al.*, 13 Ills. 33.

the appeals are taken, the judicial conference will have authority to hear all the appeals thus taken to them; at the same session; but a judicial conference has no authority, even by the agreement of parties, to hear an appeal which has been referred by a President of an annual conference to some other judicial conference.

CHAPTER IV.

THE JUDICIAL POWERS OF AN ANNUAL CONFERENCE.

By the provisions of ¶ 211 of the Discipline it is provided that the conference having jurisdiction may, if it deem it expedient, try the accused by a select number. Thus, it may appoint not less than nine nor more than fifteen of its members for that purpose; or the conference having jurisdiction may hear and determine the case in open conference without referring it to a select number as contemplated by ¶ 211, before referred to.

Independent of this authority, conferred by the Discipline upon the annual conference to appoint a select number, it is evident that no such select number, if appointed, would have any authority. The power to appoint the select number is conferred by the Discipline upon the conference; and that power must be exercised in the manner pointed out. For, while it may be true, that there are certain intendments in favor of the legality and regularity of the proceeding, there can be no intendment in favor of the right to decide. That right is not inherent in the select body; but the warrant for its exercise must be found in the Discipline.[1]

[1] In pleading a judgment of a court of limited jurisdiction, it is necessary to state those facts which gave the court jurisdiction; and having done so, then to allege generally the judgment of the court. 7 Tenn. Reports, 305. In *Sollers* v. *Lawrence* (Willes 199) Willes, Ch. J., in considering the proceedings of a court of a special and limited jurisdiction, lays down the rule to be, that nothing is to be intended in favor of their jurisdiction; but that it must appear by what is set forth in the record, that they had such a jurisdiction; and, if they had jurisdiction, every thing must be intended in favor of their judgment, and they must be taken to have judged right, unless the contrary appears, by any thing that is set forth on the record. *Mills* v. *Martin*, 19 John., 34. In the case of *Wise* v. *Withers* (3 Cranch's Rep., 331) the Supreme Court of the United States proceeded on the principle laid down in the cases cited from Willes. A Justice of the Peace had been fined by a court-martial, within the District of Columbia;

The annual conference, in addition to the jurisdiction that it exercises over traveling preachers, superannuated and supernumerary preachers, is also clothed with certain appellate jurisdiction over cases appealed from the district and quarterly conferences. Thus, by ¶ 212 of the Discipline, it is provided that a preacher on trial, who may be accused of a crime, shall be accountable to the quarterly conference of the circuit on which he travels; and that the presiding elder shall call a committee of three local preachers that may suspend him; and that the quarterly conference may try, and expel him; and that when he is expelled by the action of the quarterly conference, he shall have a right to an appeal to the next annual conference; and by the provision of ¶ 213, when a local elder, deacon, or preacher, is charged with being guilty of some crime expressly forbidden in the Word of God, the preacher having charge shall call a committee consisting of three or more local preachers, before which it shall be the duty of the accused to appear, and by which he shall be acquitted, or if found guilty, suspended until the next quarterly (or district) conference; and in case of condemnation, the local preacher, deacon, or elder, shall be allowed to appeal to the next annual conference. The manner of procedure will be pointed out hereafter, when we come to treat of the practice upon the hearing of a cause originally brought before the conference, and of proceedings in cases of appeal.

CHAPTER V.

THE JUDICIAL POWERS OF A DISTRICT CONFERENCE.

THE Discipline confers no appellate jurisdiction whatever on a district conference; and it clothes such conference with jurisdiction only to hear complaints against local preachers; to try, suspend, deprive of ministerial office and credentials, expel or

and for taking his goods to satisfy the fine, an action of trespass was brought against the collector. It was decided, first, that a justice of the peace within the district was not liable to do militia duty. Secondly, that a court-martial had no authority or jurisdiction over him; thirdly, that it was a principle, that a decision of such a tribunal in a case without its jurisdiction can not protect the officer who executes it; that the court and officers are all trespassers.

acquit any local preacher against whom charges may be preferred. The other powers, enumerated in the Discipline, conferred upon district conferences, are purely of an administrative character. The district conference, by the provision of ¶ 92 of the Discipline does not become operative and binding, except in those districts in which the quarterly conferences of a majority of the circuits and stations shall approve the same by asking the presiding elder to convene a district conference; and a district conference, when convened, is clothed with some, though not all, the powers conferred on a quarterly conference. And this is especially true of the judicial powers; for, notwithstanding the creation of the district conference, the appellate jurisdiction of the quarterly conference is continued, even in those districts where a district conference is established; so, also, proceedings against a preacher on trial are restricted to a committee appointed by the presiding elder, or to the quarterly conference. These embrace all the enumerated judicial powers conferred upon either of the conferences; and we propose to follow this enumeration with reference to the judicial powers conferred upon the administrators of the Discipline.

CHAPTER VI.

THE POWERS OF THE BISHOPS.

THE election, term of office, powers and authority of the bishops, or of a bishop, so far as such powers or authority are the mere exercise of the administration of the Discipline, do not fall within the province of this treatise. Such powers are sufficiently described and defined by ¶ 157 of the Discipline, and all of the powers in that section enumerated, except those embraced in §§ 4 and 8, belong strictly to that class. By the provision of § 4 a bishop, in the interval of the annual conference, has authority to change, receive, and suspend preachers, as necessity may require and as the Discipline directs. The exercise of this power, while it may to some extent partake of the exercise of executive authority, has also in it some of the elements of judicial determination, for it requires judgment, deliberation, and decision. Section 8 of paragraph 157 of the Discipline confers

upon the bishop presiding in an annual conference, or a bishop presiding over a select number, authority that is strictly judicial; and by the express provision of the Discipline the exercise of this authority is made the subject of review before the proper appellate tribunal. A bishop is also empowered to preside in a district conference where a local preacher is on trial accused of the commission of a canonical offense, or where a traveling preacher is accused of a crime or of immorality in the interval of an annual conference; but this right is rather by implication than by express authority conferred upon the bishop by the Discipline, the language being, "In the interval of the annual conference let the presiding elder, in the absence of a bishop, call as many traveling ministers as he shall think fit, at least five," etc. By a careful analysis of § 4, under the title, "Bishops," previously referred to, and § 1 of ¶ 203, we are inclined to the opinion that a bishop, in the interval of an annual conference, where an elder, deacon, or preacher is accused of being guilty of crime, may proceed by the calling of a committee, if he shall think fit, to investigate the matter; and if in the judgment of said committee, upon such investigation, the accused is found guilty of the offense, he may be suspended from ministerial services and Church privileges until the ensuing annual conference.

In addition to the judicial duties already enumerated, it is also made the duty of a bishop to preside in a judicial conference, and also to decide all questions of law arising therein. While it is clear that the judicial conference decides all questions of fact arising upon the face of the record and documents transmitted to it by the annual conference, yet the Discipline does not expressly declare whose duty it shall be to decide questions of law arising in like manner. The provision for trying appeals by a judicial conference was made by the General Conference of 1872, and it became necessary very early in the administration of that method of trying appeals to determine by whose authority questions of law arising in these conferences were to be decided. After the most careful consideration of the matter in all its relations and bearings, the bishops judged it to be the duty of the bishop presiding in a judicial conference to decide all questions of law arising in that body, and in their administration they governed themselves accordingly. The bishops reported

their decision and action in this matter to the General Conference of 1876, requesting that body to correct them if they had erred in thus ruling. Though this ruling was brought thus directly and distinctly to the attention of the General Conference, with the request from the bishops that if it were erroneous it should be corrected, yet that body took no action whatever on the subject, and thus tacitly, if not formally, approved the decision and administration of the bishops in the premises, and settled it as the legal rule that all questions of law arising in judicial conferences are to be decided by the bishop presiding, subject to be reviewed and corrected by the General Conference.

A bishop is also empowered by the Discipline to preside over a judicial conference convened for the trial of a bishop, and while presiding over such a conference his authority to decide all questions of law arising during the trial is strictly analogous to the authority of a *nisi prius* judge; in other words, the bishop presiding in such a trial determines the law of the case, and the conference responds as to the facts. If a bishop, while presiding upon the trial of a bishop, were to err in the administration of the law, the conference would have no power to review his decision; but if his decision were erroneous, and the bishop on trial was convicted, he would have the right to an appeal to the General Conference, where the error, if any, in the rulings might be corrected.

Paragraph 318 provides, that the three members of the "Book Committee" at New York and the three members at Cincinnati shall have power to suspend an agent or editor for cause to them sufficient, and a time shall be fixed at as early a day as practicable for the investigation of the official conduct of said agent or editor, due notice of which shall be given by the chairman of the Book Committee to the bishops, who shall select one of their number to be present and preside at the investigation, which shall be before the twelve members from the districts into which the annual conferences are distributed; two thirds of whom may remove said agent or editor from office in the interval of the General Conference. Under this provision of the Discipline the three members at New York and the three at Cincinnati are clothed with a kind of a *quasi* judicial authority to suspend an agent or editor, not arbitrarily, but for sufficient cause, from his official trust as such agent or editor. The suspension, however, is only temporary until an investiga-

tion can be had into the alleged official misconduct of such agent or editor. Where an agent or editor is suspended as contemplated by ¶ 218 of the Discipline, by the action of the New York and Cincinnati members of the Committee, it is undoubtedly the duty of such members to prepare or cause to be prepared regular charges and specifications against the accused agent or editor; and cause notice to be given by the chairman of the Book Committee to the bishops. The accused should also be served with a copy of the specifications and charges, together with a notice of the time and place fixed for the investigation. The Discipline provides that the investigation of the charges and specifications involving the official conduct of the accused shall take place before the twelve members of the Book Committee, chosen by the General Conference as the representatives of the twelve districts of conferences into which the whole Church had been divided.

It would seem from the scope of the Discipline and from the nature of the case, that the chairman of the Book Committee and the bishop designated to preside should fix the time and place for the investigation. Twelve members are designated as constituting the tribunal before which such investigation takes place; and an important inquiry arises: Can an investigation be had before a less number, or must twelve members sit in order to constitute the tribunal a legal one? The authority is wholly disciplinary, and upon principle the tribunal should be constituted in accordance with its provisions; and it is fair to conclude that the whole number designated are required to be present and take part in the deliberation, although two-thirds, or eight of the Committee, have power to remove such agent or editor from office in the interval of the annual conference.

This investigation is in the nature of impeachment, and partakes of a judicial character, and should be investigated the same as any other disciplinary offense; and the Committee, while engaged in such investigation, should be presided over by the bishop selected by the board of bishops. The powers of the bishop, while presiding, are not defined by the Discipline. It is, however, fair to presume that he is clothed with authority during such investigation to decide all preliminary questions, and all questions of law.

Finally, a bishop has the right to preside in the General Con-

ference where such conference is exercising an appellate jurisdiction; but there his decisions are only binding on the General Conference, or the Judiciary Committee of the General Conference, so far as acquiesced in by the General Conference, or by the Judiciary Committee of the General Conference.

There is, therefore, a marked distinction to be observed between the duties and responsibilities of a bishop when presiding in an annual or judicial conference when it is exercising either original or appellate jurisdiction, and his duties and responsibilities when presiding in the General Conference whose authority is supreme, and in which all errors of administration in inferior tribunals are subject to final review and correction.

CHAPTER VII.

THE JUDICIAL POWERS OF A PRESIDING ELDER.

THE judicial powers of the presiding elder are much the same within certain limits, prescribed by the Discipline, as those that are conferred upon the bishop. His duties, of course, are, to some extent, subordinate to the power and authority of the bishop. He should see that every part of the Discipline is enforced in his district, and it is his duty, in the absence of the bishop, to take charge of all the elders and deacons, traveling and local preachers, and exhorters, in his district; and he has power to change, receive, and suspend preachers, in his district, during the intervals of the conferences, and in the absence of the bishop, as the Discipline directs; provided, however, that a presiding elder shall not change a preacher from a charge to which he has been appointed by the bishop, and appoint him to another to which he could not be legally appointed by the bishop. The same limitation applies also to superannuated and local preachers, who are employed in the work.

A very important question arises on section second of ¶ 163 of the Discipline, where it speaks of the exercise of the enumerated powers of the presiding elder in the absence of a bishop. In what sense must the bishop be absent, in order to the exercise, or the rightful exercise, of these powers by the presiding elder? Must the bishop be absent from the territorial limits assigned to

the presiding elder, or is it sufficient that the bishop be absent at the time of the exercise of the powers conferred conditionally? We are inclined, in looking carefully through that portion of the Discipline prescribing the powers and duties of a presiding elder, to the opinion that the term absent has reference to absence from his district. The term absent occurs in several places in this chapter of the Discipline; and it seems, when used, to be used in a restricted sense; besides, this construction is better adapted to the local wants of the district.

The presiding elder has authority to decide all questions of law involved in proceedings pending in a district or quarterly conference, subject to an appeal to the president of the next annual conference. By this, we do not understand that the decision of the presiding elder can be reviewed in the interval of the annual conference, nor by the President of the annual conference, unless the decision of the quarterly conference is regularly brought, by appeal, from the quarterly conference to the annual conference; in other words, the decision of a presiding elder, made in a quarterly conference, can not be decided by the President of an annual conference, as a mere abstract question of law; but the decision must be regularly obtained in order to make it any thing more than a mere *obiter dictum*, or loose saying,[1] in connection with a cause actually on hearing, before the conference, in due course of disciplinary administration.

[1] *Obiter dicta*, in practice, are judicial opinions expressed by the judges on points that do not necessarily arise in the case.

Dicta are regarded as of little authority, on account of the manner in which they are delivered; it frequently happening that they are given without much reflection, at the bar,—without previous examination, "If," says Huston, J., in *Fauts* v. *Brown*, 17 Serg. and Rawle, 292, "general *dicta* in cases turning on special circumstances are to be considered as establishing the law, nothing is yet settled, or can long be settled." "What I have said, or written out of the case trying," continues the learned judge, "or shall say or write under such circumstances, may be taken as my opinion at the time, without argument or full consideration; but I will never consider myself bound by it when the point is fairly trying, and fully argued and considered. And I protest against any person considering such *obiter dicta* as my deliberate opinion." And it was considered by another learned judge, Mr. Baron Richards, to be a "great misfortune that *dicta* are taken down from the judges, perhaps incorrectly, and then cited as absolute propositions." 1 Eng. Ecc. R. 129; Ram on judgments, Ch. 5, 36; 2 Bing. 90. In the French law, the report of a judgment made by one of the judges who has given it is called the *dictum*. Path. Prac. Civ. partie, c. 5, Art. 2.

It is the duty of the presiding elder, in the absence of a bishop, as we have previously shown, where a traveling elder, deacon, or preacher is accused of a crime, to assemble a committee for the investigation of such accusation, and to preside at the trial; and to decide all preliminary questions, and questions of law, that may arise during the progress of such investigation; it is also his duty, in the absence of a bishop, to preside in the district conference; and that conference has authority conferred on it, as has been before shown, to hear complaints against local preachers, to try, suspend, deprive of ministerial office and credentials, expel or acquit, any local preacher against whom charges may be preferred. And, finally, the Discipline makes it the duty of the presiding elder to preside in the quarterly conference, in case of a trial, or where an appeal has been taken by a member of the Church to that conference; and in case of an appeal to grant, or order, a change of venue, where, in his judgment, because of local prejudice, an impartial trial can not be had in the quarterly conference of the circuit, or station, where the appellant resides.

CHAPTER VIII.

THE JUDICIAL POWERS OF MINISTERS IN CHARGE.

THE Discipline makes it the duty of a preacher in charge of a circuit or station, where a member of the Church belonging to such circuit or station is accused of immoral conduct, to bring such accused member to trial before a committee of not less than five, who shall not be members of the quarterly conference; and upon such trial, it is made the duty of the preacher in charge to preside, and to decide all preliminary questions, and questions of law, that may arise during the progress of the trial. And if the accused is found guilty of a crime expressly forbidden in the Word of God, then to pronounce such member expelled from the Church, where such is the sentence pronounced by the committee.

While the duties of a preacher in charge of a circuit or station are of the most sacred and delicate nature, including baptism, the administration of the Lord's-supper, attending in cases of sickness, marriages, and deaths, he has no other judicial powers than the one above referred to, except when presiding in a quarterly conference in the absence of the presiding elder. In the administration of

the Discipline, all the other powers, either expressly or incidentally granted, or with which he is clothed by the Discipline, or by the usages of the Church, are of a mere ministerial character. This reference to the distribution of the authority of the Church, in administration of disciplinary power, includes all the authority of a judicial character that is provided for in the Discipline.

Having ascertained the different tribunals of the Church, and the scope and limits of their powers, we propose next to consider, in their proper order, a trial before these different tribunals, marking carefully the different forms of procedure before each.

CHAPTER IX.

THE TRIAL OF A BISHOP.

THE Discipline provides that a bishop is answerable for his conduct to the General Conference, which shall have power to order the manner of his trial. What, we apprehend, is here meant is, that the General Conference may provide by law for the manner of bringing an accused bishop to trial. Not that they may arraign and try him without any previous rules or regulations governing the conduct and management of such trial; for it would be highly prejudicial, and unjust, to leave the trial of a bishop to the arbitrary discretion of the tribunal before which he is to be tried, or to blend the trial and the making of rules and regulations for the government of the trial, into one proceeding. The provision contained, as we have previously seen, in the Constitution of the United States, and of almost every State in the Union, is to the effect that no *ex post facto* law shall be passed. And while it may be true, that this provision is not absolutely binding upon the General Conference, the analogies and reasons of the rule are so apparent that its justice will not be questioned anywhere. It has never been held, that the Legislatures, under this provision of the Constitution, were prohibited from changing the law with reference to the conduct, management, and practice governing criminal trials, after the offense has been committed; yet there is great propriety in trying an accused party by the law that is in force at the time when the crime is committed;

for if we concede the right to make a change in regard to the law of the right and the law of the remedy, it often becomes difficult to determine between the one and the other. We have referred briefly to this question, because of the meagre provisions contained in the Discipline for the trial of an accused bishop.

As the Discipline now stands, the appeal of a bishop accused of immorality would have to be tried in open conference, before the entire body, for there is no provision contained in the Discipline authorizing a bishop to be tried by a select number, or a committee.[1]

What we have said under the head of judicial powers of annual conferences is here applicable, except that the powers of the General Conference are not restricted and limited to the same extent that the powers of an annual conference are, but neither conference possesses the authority of referring the exercise of a power conferred by the Discipline upon the conference, to a select number in the absence of an express provision of the Discipline.

Where a bishop is accused of immoral conduct, the Discipline provides that the presiding elder, within whose district such immorality is alleged to have been committed, shall call to his aid four traveling elders, and that he and they shall carefully inquire into the case; and, that if upon such investigation, in

[1] It is a familiar proposition, that what one does by another he does by himself; and it need not be stated that a man may authorize another to do for him whatever he may lawfully do for himself; but this is only true as a general proposition, when the agent appointed may himself execute the powers conferred. If the performance of the trust, or execution of the powers, involves the employment of another agency not having the capacity for its execution, the power itself can not be effective. In any proper form, one may delegate to another complete authority to regulate, control, dispose of, receive and receipt for his property of whatever description; but he can not by any form of commission, whatever the powers of the agent may be, confer upon a justice of the peace, or other court of limited jurisdiction, a power not conferred by the statute. Whilst any competent person may, by his own act, or contract, dispose of his rights and property at his discretion, yet they can not be disposed of by the judgment of a court having no jurisdiction over the subject. And when a general jurisdiction of the subject-matter exists, but the statute has prescribed the mode and particular limits in which it may be exercised, it must be confined to the limits thus prescribed, and can not be exercised in any other manner, nor upon any other terms. *M'Ceary* v. *M'Lain*, 2 Ohio State, 369.

their judgment, there is reasonable ground for such accusation, they, or a majority of them, shall prepare and sign the proper charge or charges in the case, and shall send a copy thereof, so signed, to the accused, and give notice thereof to one of the bishops; and that the bishop so notified shall convene a judicial conference, to be composed of the triers of appeals in the five neighboring conferences; and that such judicial conference shall have full power to try the accused bishop, and to suspend him from the functions of his office or expel him from the Church, as they may deem his offense requires.

The judicial conference, provided for by the Discipline, for the trial of an accused bishop, is composed of the triers of appeals, chosen by the annual conferences; but instead of the triers of appeals from three annual conferences, the Discipline requires that they be taken from five, thereby increasing the number from twenty-one to thirty-five and instead of exercising an appellate jurisdiction to review the decision of some other inferior or subordinate tribunal, they exercise an original jurisdiction conferred upon them by the Discipline, and by the charges prepared and signed by the presiding elder's committee. If proper charges are not made out and signed by a majority of the committee, then the bishop has no authority to convene a judicial conference; and the judicial conference has no authority to try the accused bishop. Mere irregularity in the proceeding would not have the effect, however, to render the whole proceeding *coram non judice*, or void. Before such a result would follow, there must be a substantial failure on the part of the presiding elder's committee to comply with the Discipline.

When the judicial conference is assembled, or convened in session, it is made the duty of one of the bishops to preside at the trial; and the accused has the right, before proceeding to trial, to a peremptory challenge of the triers of appeal; yet not so as to reduce the number of the judicial conference below twenty-one. This challenge should be regularly made at the time the judicial conference is being organized; for if it is not then made, it will be considered as waived; and after the trial has commenced it will be too late to insist upon it. The challenge can not be exercised so as to reduce the number present below twenty one; for that number is required in order to constitute the

judicial conference. Neither, in strictness, can a member of such judicial conference, who was not present at the organization of the conference, take his seat without the consent of both parties. The Discipline is silent in regard to the right of the prosecution to challenge the trier, or triers, of appeals, either peremptorily or for cause; but we presume that if a trier of appeals was for any cause legally incapacitated, and unfit to sit as one of the judges, because of relationship, or because he had formed and expressed an opinion, and was so prejudiced that he could not render a fair and impartial decision, he might be set aside upon the challenge of the prosecution. When a challenge is interposed, and there is any question in regard to the right to make the challenge, or to the time in which the challenge shall be interposed, it is the duty of the presiding bishop to decide the question.

There is no provision in the Discipline expressly empowering any one, as in the case of other judicial conferences, to fix the time and place of the trial; yet we think it is evident that this is the duty of the bishop empowered to convene the judicial conference. He must of necessity be clothed with this power, and also the authority of determining the annual conferences from which the triers of appeals shall be taken. It will be observed that the trial authorized by the Discipline confines the investigation to the charge of immorality. That term, as used in the Discipline, has a generic meaning, and includes any act which is inconsistent with moral rectitude, contrary to the moral or divine law, wicked, unjust, dishonest, or vicious; but it is not so used as to include imprudent conduct; as is evident from the further provision contained in the Discipline, by which if a bishop is charged with imprudent conduct, a presiding elder shall take with him two traveling elders, and shall admonish the bishop so offending. In case of a second offense, one of the bishops, together with three traveling elders, shall call upon him, and reprehend and admonish him; and if he still persists in his imprudence, he shall be tried in the same manner as though he had been guilty of immoral conduct, that is, the presiding elder of the district where such imprudent conduct is charged to have taken place, together with four traveling elders, shall prefer charges against him in accordance with the provisions of ¶ 198 of the Discipline.

This provision, contained in ¶ 200 of the Discipline, is preliminary and jurisdictional, without which the bishop ought not to be arraigned and put upon his trial. Whether it is necessary to recite in the charges and specifications that these preliminary steps have been taken, or whether it will be presumed that such proceedings as were requisite to confer jurisdiction upon the judicial conference were had, or whether the jurisdiction will be presumed, and the burden devolved upon the defendant to show that the Discipline has not been complied with, we shall not attempt to determine. It is nevertheless evident that a charge of imprudent conduct, with only a single specification, would not be sufficient, as the bishop is only liable to be dealt with canonically for the third offense; and at least three or more offenses, charging imprudent conduct, should be regularly alleged in the complaint, and not only alleged, but the evidence must be sufficient to establish three different acts of imprudence, before the accused bishop is liable to be dealt with in accordance with the provisions of ¶ 198 and ¶ 199.

There is no provision requiring a judicial conference to preserve the evidence upon which its findings are based. Such conference proceeds in the same manner as any other Church tribunal, in the investigation of the facts, except that they are not required by the Discipline to reduce the evidence taken by them to writing, and to deliver it to the appellate conference. And in case of an appeal to the ensuing General Conference, the trial before the General Conference is a trial *de novo*, and neither party has the right, under the Discipline, to use the evidence taken before the judicial conference, even if preserved and authenticated; it could only be used by consent of parties.

Another important question to be considered in this connection is as to the effect of an acquittal of a bishop before the judicial conference, upon the right of the General Conference to investigate the charges over anew. If such investigation, or trial, is to be regarded as a trial, in the legal import of the term, then the prosecution ought to be barred. But we will consider that question under another head. By the provisions of ¶ 202 of the Discipline, complaints against the administration of a bishop may be forwarded, or made to the General Conference, and entertained by the General Conference, provided due notice has

been given the bishop complained of. Under these provisions of the Discipline, there is but one mode prescribed by which a bishop can be dealt with canonically for inefficiency, or for disseminating doctrines that are contrary to the Articles of Religion contained in the Discipline, that is, by bringing the matter directly before the General Conference to which he is amenable, and which has power not only to order the manner of his trial, but to determine the character of the sentence to be pronounced in case he is adjudged guilty.

CHAPTER X.

PROCEEDINGS AGAINST TRAVELING MINISTERS.

THE Discipline provides that when an elder, deacon, or preacher is accused of being guilty of a crime, or offense, expressly forbidden in the Word of God, sufficient to exclude a person from the kingdom of grace and glory, in the interval of the annual conference, that the presiding elder, in the absence of a bishop, shall call as many traveling ministers as he shall think proper, so that the number summoned is not less than five, and if possible bring the accused and the accuser face to face, and upon the investigation, cause a correct record of such investigation to be made and transmitted to the annual conference. If upon the hearing of all the proofs and allegations of both parties, such minister be clearly convicted, it shall be the duty of the committee to suspend him from all ministerial service, and Church privileges, until the next ensuing annual conference, at which his case shall be fully considered and determined. Where the accused is a presiding elder, it is made the duty of three of the senior preachers of his district to inquire into the character of the report, and if they deem it advisable, such senior preachers have the right to call the presiding elder of any adjoining district; such presiding elder, when so called, shall appoint a committee of five elders from within the bounds of the annual conference of which the accused is a member, and it is made his duty to preside at the examination, which examination should not take place until the accused has been duly notified of the appointment of the committee, and of the time and place fixed

for hearing. The accused, whether a traveling minister or presiding elder, should also be served with a copy of the charges and specifications preferred against him, if possible or practicable; so that he may have every opportunity of making his defense, and vindicating his character and reputation. This proceeding is summary, yet, notwithstanding this fact, it should be so managed, if practicable, that the accuser and the accused should be both present, and brought face to face; for there is a better opportunity of investigating facts, where the witnesses confront the accused; but if the accused flees or refuses to attend the trial, after being duly notified, his failure to obey the order of the Church tribunal shall be received as *prima facie* evidence of his guilt. There has always been a distinction between the rules of evidence in our civil courts and in ecclesiastical courts. One credible witness, in our common-law courts, has always been held sufficient to justify a conviction, even for the gravest crimes known to the law, except in cases of treason and perjury. The Discipline, however, while speaking of this preliminary investigation, provides that out of the mouth of two or three witnesses he shall be condemned; not, finally, even then, until the case has been considered and passed upon by the annual conference, which has original jurisdiction of the traveling minister or preacher. This examination, provided for in the interval of the annual conference, is only a preliminary one, and determines but one question, in the event of the accused being found guilty, and that is, that the minister should be suspended from all ministerial service and Church privileges, until the ensuing annual conference.

There are several other preliminary investigations provided for by the Discipline, to which we will briefly refer in their order:

First. If charges be preferred against a minister at an annual conference, the case may be referred to a committee, to be investigated in the presence of a presiding elder, or other member of the conference, appointed by the bishop in his stead; such committee to cause a faithful record of the proceedings to be laid before the conference, on which, with such other evidence as may be introduced and admitted on either side, by the conference, the case shall be decided. This provision of the Discipline, authorizing the appointment of such a committee, does not invest the

committee with any thing beyond the mere ministerial duty of taking and reporting the evidence. They have no authority to decide on any question, except it may be on the question of the admissibility of evidence. Their powers are not unlike the power conferred, under an order of reference, by a court to a master or other commissioner, to take and report testimony. The committee makes no report, further than the simple reporting of the evidence. They are not authorized and empowered, by the Discipline, to draw any conclusions from the testimony thus introduced. When the case can not be tried during the session of the conference for want of testimony, it may be referred to the presiding elder having charge of the preacher complained of, who shall proceed as directed in ¶ 203, §§ 1, 2, 3.

Second. Another preliminary proceeding, authorized by the Discipline, is in case where a traveling minister or preacher is guilty of improper temper, words, or actions. The person so offending shall be reprehended by a senior in office. Should he be guilty of transgressing a second time, the presiding elder is authorized to take one, two, or three preachers to witness his being reprehended the second time. And if such preacher still persists in a repetition of such offense, then the presiding elder should proceed to investigate the case, as directed in sections one and two of ¶ 203.

Third. Under ¶ 206 of the Discipline, where a member of an annual conference fails in business, or contracts debts which he is not able to pay, the presiding elder should appoint three judicious members of the Church to inspect the accounts and circumstances of the supposed delinquent; and where, upon such examination and investigation, it is the opinion of the members thus selected that the traveling preacher has behaved dishonestly, or contracted debts without the probability of paying, he should be subjected to the preliminary proceedings directed by sections one and two of ¶ 203. Again, ¶ 207 of the Discipline, provides that when a minister or preacher holds, and disseminates publicly or privately, doctrines which are contrary to the Articles of Religion of the Methodist Episcopal Church, and will not solemnly promise to abstain from disseminating such erroneous doctrines, in public and private, he shall be dealt with preliminarily as when guilty of gross immorality. Yet, notwithstanding his promise

not to disseminate such erroneous doctrines, he is still liable t be dealt with canonically before the annual conference.

When a traveling preacher, in the interim of an annua conference, refuses to attend to the work assigned to him, th presiding elder of the district where the work is situated, shoul proceed to investigate the matter, as directed in sections one an two of ¶ 203 of the Discipline. These embrace all of the cause that may be investigated out of the annual conference, prelimin arily, where the offenses have arisen since the meeting of th last annual conference or are investigated by its order.

The annual conference or a committee or select number onl have authority to try an accused elder, deacon, or preacher where such elder, deacon, or preacher is charged with bein guilty of some crime or offense against the canons of the Church Before a member of the annual conference is required to answe for an offense, regular charges should be made out against him and such accused member should be served, if practicable, wit a copy thereof, unless there has been preliminary proceeding instituted against him in accordance with ¶ 203 of the Disciplin for his arraignment before the presiding elder's committee an the record and proceedings of investigation are required to b kept and transmitted to the annual conference, and may be use either against him or in his favor. The findings, however, o the committee selected to inquire into the offense, is not evidenc either for or against the accused. There would be great impro priety in a trial before the annual conference in receiving in evi dence or giving weight to the decision of the committee, for b the express provisions of the Discipline the inquiry of the com mittee is restricted to the question as to whether the ministe accused shall be suspended from all ministerial services an Church privileges until the ensuing annual conference. Beside the conference or the conference committee ought to decide th question upon the evidence for themselves independent of a extraneous considerations.

The effect to be given to the findings of the committee appointe by a presiding elder in the annual conference in case the accuse is acquitted by the committee is nowhere determinable by th Discipline; but from the character of the investigation, and fro the analogies to be drawn from our civil law, we judge that th

acquittal is not conclusive, and does not operate by way of estoppel to preclude a further investigation or trial, but that, notwithstanding such acquittal, the facts of the case may be investigated again *de novo*, the same as though no preliminary proceedings had taken place, and no determination reached by the committee, subject to this qualification, that to investigate the cause again is not a mandatory duty upon the conference as it would be in case of a conviction and suspension. Section 2 of ¶ 203 provides for bringing, if practicable, the accusers and the accused face to face, as we have before mentioned, as in case of an indictment, where the defendant is accused of the commission of the crime of treason or felony. And the same paragraph indicates that a conviction should not be based upon the testimony of a single witness; but out of the mouth of two or more witnesses he shall be condemned, whether it would be sufficient under this provision to base a conviction upon the testimony of one witness and corroborating circumstances is not determinable from the language of the Discipline. We presume, however, that an accused traveling minister or preacher might be convicted upon circumstantial evidence[1] the same as a party may be convicted by circumstan-

[1] The distinction between direct and circumstantial evidence is this, Direct or positive evidence is when a witness can be called to testify to the precise fact, which is the subject of the issue on trial; that is, in a case of homicide, that the party accused did cause the death of the deceased. Whatever may be the kind or force of the evidence, this is the fact to be proved. But suppose no person was present on the occasion of the death, and, of course no one can be called to testify to it, is it wholly unsusceptible of legal proof? Experience has shown that circumstantial evidence may be offered in such a case; that is, that a body of facts may be proved of so conclusive a character as to warrant a firm belief of the fact, quite as strong and certain as that on which discreet men are accustomed to act in relation to their most important concerns. It would be injurious to the best interests of society, if such proof could not avail in judicial proceedings. If it were necessary always to have positive evidence, how many criminal acts committed in the community destructive of its peace and subversive of its order and security would go wholly undetected and unpunished.

The necessity, therefore, of resorting to circumstantial evidence, if it is a safe and reliable proceeding, is obvious and absolute. Crimes are secret. Most men, conscious of criminal purposes, and about the execution of criminal acts, seek the security of secrecy and darkness; it is therefore necessary to use all other modes of evidence besides that of direct testimony, provided such proof may be relied on as leading to safe and satisfactory conclusions; and, thanks to a benevolent providence, the laws of nature, and the relation of

tial evidence in our civil courts; and that the meaning of the Discipline is this, that the weight of evidence should be equivalent to the testimony of two or more credible witnesses. The Discipline, in requiring this amount of evidence, takes into consideration the position of the accused; the improbability of one occupying so exalted a position plunging into crime; the several degrees of probation and trial that are necessary to be passed through before he can become a member of the annual conference; the yearly examination of character, and in view of the jealous watchfulness of the Church,[1] before he can be admitted into full fellowship with the Church; and putting these facts into the opposite side of the scale, they are sufficient to overcome the uncorroborated testimony of a single witness. Even in our civil courts, where a party is accused of an offense, the law receives evidence of the previous good character of the accused, as far as the alleged offense is concerned; and, in some States, the question of character is not restricted, but the inquiry may be general; for it reasons, and reasons correctly, that a man who has been careful to build up and establish a fair reputation among his neighbors, friends, and acquaintances, would not be likely to cast it aside and to engage in the commission of crime.[2]

things to each other are so linked and combined together, that a medium of proof is often thereby furnished, leading to inferences and conclusions as strong as those arising from direct testimony. *Commonwealth* v. *Webster*, 5 Cushing, 311.

[1] Parson, C. J., said that he was of the opinion that a prisoner ought to be permitted to give, in evidence, his general character in all cases; for he did not see why it should be evidence in a capital case, and not in cases of an inferior degree. In doubtful cases a good general character, clearly established, ought to have weight with a jury; but it ought not to prevail against the positive testimony of credible witnesses. Whenever the defendant chooses to call witnesses to prove his general character to be good, the prosecutor may offer witnesses to disprove their testimony; but it is not competent for the prosecutor to go into this inquiry until the defendant has voluntarily put his character in issue, and in such case there can be no examination as to particular facts. 2 Russell on Crimes, 703, 2d ed. Sewall and Parker, J. J., said that they were not prepared to say that the testimony of general character should be admitted in behalf of the defendant, in all criminal prosecution, but they were clearly of the opinion that it might be admitted in capital cases, in favor of life. *Commonwealth* v. *Hardy*, 2 Mass., 317.

[2] The principle upon which good character may be proved is, that it affords a presumption against the commission of crime. This presumption arises from

In considering the weight to be given to evidence, where a party is accused of the commission of a crime, it naturally divides itself into two parts. *First*, the evidence of the *corpus delicti*, or body of the crime, and *second*, the guilty agent who has perpetrated it. It is said that the only fact which the law requires to be proved by direct and positive testimony, is the *corpus delicti* itself; the fact of who committed the crime, or who is the guilty participant in the commission of the offense, may be established by circumstantial evidence; but so long as there is any reasonable doubt as to the commission of the crime, there can be no certainty as to the party who committed it. Thus, Baron Park told the jury that the only fact which the law requires to be proved by direct and positive evidence, in a case of murder, was the death of the party by finding the body, or when such proof is

the improbability, as a general rule, as proved by common observation and experience, that a person who has uniformly pursued an honest and upright course of conduct, will depart from it and do an act so inconsistent with it. Such a person may be overcome by temptation, and fall into crime; and cases of this kind often occur, but they are exceptions. The general rule is otherwise. The influence of this presumption, from character, will necessarily vary according to the varying circumstances of different cases. It must be slight when the accusation of crime is supported by the direct and positive testimony of credible witnesses; and it will seldom avail to control the mind in cases where the testimony, though circumstantial, is reliable, strong, and clear. But in cases where the other evidence is nearly balanced, but slightly preponderating against the defendant, the presumption from proof of good character is entitled to great weight, and will often be sufficient to turn the scale, and produce an acquittal. We are unable to perceive why this presumption may not and should not, as a general rule, be as controlling in cases of high crimes as in those of smaller ones. In case of murder, arson, robbery, or any other great offense, when it is apparent that it must have been planned and committed with great deliberation, and the evidence against the accused is uncertain, why should not proof of good character influence the judgment as powerfully as in any case? I can readily see, that in cases of great crimes, evidently perpetrated with but little, if any, forethought, under the influence of some sudden and powerful motive, such proof will be comparatively weak; but it will be so in reference to any other crime, with similar circumstances. The attending circumstances must, I think, determine the degree of force which evidence of good character should have. It is not, in ordinary cases, affected by the grade of the offense. Formerly such evidence was admissible in capital cases, but now it will be received in criminal cases generally. 1 M'Nally's Ev. 320–323; 18 Ala. 720; 2 Starkie, 303; 2 Bennett and Heard's Leading Criminal Cases, 159–160; Burrill's Circumstantial Ev. 530–532; *Cancemi* v. *The People*, 16 N. Y. 506.

absolutely impossible, by circumstantial evidence leading closely to that result; as where the body was thrown overboard far from land, which is quite enough to prove the fact without producing the body.[1] When an offense has been made out by direct evidence, and it is clear that a crime has been committed, there must *ex necessitate rei*, or from the necessity of the case, be a guilty agent, or some one guilty of the offense; and such guilt, or the connection of the person accused of the crime with the crime, may be established by circumstantial evidence. And these rules of evidence are as pertinent and relevant to a Church trial or investigation as they are to any other class of cases, where they are involved.

A question often arises how far it is the duty of the court, or of the presiding officer, to interfere where the prosecution has failed to prove some material fact of the essence of the crime, or some fact which is essential to the conviction. It is the province of the court, or the presiding officer, to respond to the law of the case, and of the jury or committee to pass upon all questions of fact. If the prosecution leaves some element necessary to constitute the crime entirely unproved, it is a clear case for the interposition of the court, or of the presiding officer; as in the case of treason or perjury, where two witnesses are required, and only one is produced; and in any case, when assuming all the facts proved to be true they fall short of constituting the crime, the accused is entitled to have the instruction of the court in his favor: but where competent evidence, or evidence relevant and pertinent, has been given, tending to prove every element contributing to the crime, and showing the connection between the accused and the crime, and the force and effect which ought to be given to it depends upon the credibility of witnesses, and the inferences to be drawn, as to which persons, may well differ, it is not the province of the court, or of the presiding officer, to take the case from the consideration of the jury or of the committee, although such court, or

[1] In the case of *Videtta* (1 Park. Cr. R. 609) Walworth, C. J., says: "One rule, which ought never to be departed from, is, that no one should be convicted of murder on circumstantial evidence, unless the body of the person supposed to have been murdered has been found, or there be other clear and irresistible proof that such person is actually dead." *Ruloff* v. *The People*, 18 N. Y. 188.

officer, may be of the opinion that the evidence will not justify a conviction.

In a case where the evidence is weak and unsatisfactory, the presiding officer can always impress the committee with the benign principles of the common law, founded upon justice and mercy, established and recognized by the wisdom of ages for the protection of the innocent. Such as that the prosecution are bound to make out a clear case; that the accused is entitled to the benefit of all reasonable doubts; that is it better that ninety-nine or an indefinite number of guilty persons should escape than that one innocent man should suffer. This is the extent to which the presiding officer would be justified in going in a case where any view of the facts may be required to be taken in order to conviction. Justice is better administered, both in civil and criminal cases, as well as in ecclesiastical cases, by confining the respective duties of the presiding officer and the committee within their strict limits, and permitting no encroachment by either.

There may often be questions presented before the conference, as to whether certain persons are amenable to a particular conference. Such questions being questions of law should be decided, ordinarily, by the president of a conference, or other presiding officer, except where there is connected with the question of law a question of fact; and then it is for the presiding officer to declare the law, or to instruct the committee upon the question of law involved. And in such cases it is for the committee to receive the law from the presiding officer, and apply it to the facts.

CHAPTER XI.

TRIALS OF SUPERANNUATED AND SUPERNUMERARY PREACHERS.

SECTION 3 of ¶ 203 of the Discipline provides that if the accused be a superannuated or supernumerary preacher, living out of the bounds of the conference of which he is a member, he shall be held responsible to the annual conference within whose bounds he may reside; and such conference shall have power to try, acquit, suspend, locate, or expel him in the same manner as though he were a member of such conference. In treating of preliminary

investigations, under the direction of a bishop, or of a presiding elder, in accordance with § 1 of ¶ 203, we did not include proceedings against superannuate or supernumerary preachers, living out of the bounds of their own conference, and within the bounds of another conference, for the reason that the language of § 3 does not seem to be sufficiently broad and comprehensive to confer such authority on a bishop or presiding elder; but the language seems to restrict the trial to the proceeding before the conference itself. We are aware that the title "trial of preachers" would seem to place a construction on this paragraph different from the one we have given it. But jurisdiction can in no case be made out by inferences; and as we view the question, except for § 3, an accused superannuated or supernumerary preacher, residing out of his own conference, would be still amenable to the jurisdiction of his own conference, and not liable to be tried elsewhere; and, therefore, unless the paragraph is broad enough to confer the jurisdiction, or the authority of the bishop or presiding elder, over him to direct a preliminary inquiry, such authority does not exist, but he is amenable alone to the conference, in whose bounds he resides, or to the conference of which he is a member.

CHAPTER XII.

TRIAL BY AN ANNUAL CONFERENCE COMMITTEE.

THE Discipline provides, that where an annual conference can not try a traveling minister, or preacher, during the session of the conference, for want of testimony, and such conference refers the trial to the presiding elder having charge of the preacher complained of, such presiding elder shall proceed as directed in §§ 1 and 2 of ¶ 203. Under this provision a question arises, What is the character of the findings by the committee? are they preliminary, with power only to suspend the preacher from all ministerial service, and Church privileges until the ensuing annual conference, or is such trial in contemplation of law a trial by the conference, or by a select number, as provided in ¶ 211 and, therefore a final determination, from which an appeal lies to the judicial conference? The wording of the

Discipline indicates that such trial is preliminary merely, and that no appeal can be taken from the decision of the committee; but that, before an appeal is allowable, it must first be passed upon by the conference, and that the appeal must be taken not from the action of the committee, but from the decision of the conference.

CHAPTER XIII.

PROCEEDINGS AGAINST PREACHERS ON TRIAL.

PREACHERS of this class, when they are accused of crime, are not amenable to the annual conference, but they are held accountable to the quarterly conference of the circuit on which such preacher travels. In other respects he is amenable to the annual conference, that conference having authority over his right to preach; and it is expressly provided in the Discipline that his continuance on trial shall be equivalent to the renewal of his license to preach; but the conference may refuse to continue him on trial without assigning any cause whatever for such refusal, and in doing so he is not wronged; he enters the traveling connection on trial with a knowledge that the conference may either admit or reject him. What we have said with reference to the trial of a preacher in full connection, applies to a preacher on trial, except that he is tried before the quarterly, instead of before the annual, conference, and that it may be that the same amount of evidence required to convict a traveling minister, in the full connection, would not be required for his conviction; but that evidence which satisfies a committee of his guilt, is all that the Discipline requires. There may be a reason assigned for this distinction; the one is on probation, it is an experiment with the Church, his fitness to preach the Gospel has not been fully tested and determined; the other has passed through every ordeal, and been subjected to every trial and test known to the Church, has served out his probation, and has publicly taken upon himself the vows of the Church to consecrate himself to the work of the ministry, the highest and holiest duty that was every intrusted to man; and, therefore, it is the policy of the Church to throw around such a one the mantle of protec-

tion, and to be slow to believe and jealous of the reputation not only of the preacher, but of the Church. And because of this, there may well be a distinction drawn between a preacher in the full connection and a preacher on trial. In analogy to the common-law rule, both are tried by their peers or equals.

A preacher on trial, convicted by a quarterly conference, where such conviction has been followed by sentence of expulsion or otherwise, may appeal from such decision to the next annual conference.

The Discipline, in case of an appeal by a preacher on trial, is silent as to the mode of trial in the annual conference. The usage of the Church, however, is to proceed the same as in case of the trial of a local preacher, deacon, or elder, who appeals in accordance with the provisions of ¶ 243 of the Discipline, and such mode of trial in the annual conference, on appeal, will be found fully treated of under the title of "Appeals by Local Preachers, Deacons, or Elders."

The annual conference exercises over a preacher on trial nothing but an appellate jurisdiction, and has no authority to allow new charges or new specifications; and is, upon such trial, restricted to the evidence offered before the quarterly conference, and taken and preserved in the records and minutes of the quarterly conference. It may be thought, however, that the annual conference, having jurisdiction upon an appeal over the subject-matter and the accused, might, in the exercise of a sound judicial discretion and in furtherance of justice, allow amendments of the charges and specifications, provided such amendment or amendments do not amount to the introduction of new charges and new specifications, but there is no authority for such an administration.

The entire proceedings are summary, and from the scope of the Discipline, it is evident that its design is to avoid, as far as practicable, all technical rules by which the innocent may sometimes be made to suffer and the guilty allowed to escape punishment. While this is right to a limited extent, it should not be carried to such an extreme as entirely to abrogate all rules of investigation, and leave every administrator of the Discipline, and every tribunal of the Church, free to decide and administer it according to his own caprice. If we have rules at all, they must be substantially obeyed, though, for certain purposes, the

presiding officers are clothed with authority and discretion in the administration of such rules, so as to vary their application as circumstances might seem to require. In making application of the rules, in a given case, great judgment and discretion should be used, and thus avoid the reproach that is so often heaped upon the administrators of the Discipline, that they have no fixed rules for the government of judicial investigation, and that their authority is arbitrary and despotic.

CHAPTER XIV.

PROCEEDINGS AGAINST LOCAL PREACHERS.

By the provisions of ¶ 213 of the Discipline, where a local elder, deacon, or preacher is charged with the commission of a crime expressly forbidden in the Word of God, sufficient to exclude a person from the kingdom of grace and glory, it is the duty of the preacher in charge to call a committee consisting of three or more local preachers, before which it shall be the duty of the accused to appear, and by which such local elder, deacon, or preacher, upon investigation, may be acquitted, or if found guilty, suspended until the next quarterly conference. Upon such investigation the preacher in charge shall cause exact minutes of the testimony and examination to be made; and such testimony, together with the charges, specifications, and decision of the committee, shall be laid before the quarterly conference, where it shall be the duty of the accused to appear, in those districts that have not adopted the law with reference to district conferences, and in those districts that have organized district conferences, then before the district conference.

If the accused, when duly notified, refuses to appear before the committee at the time and place fixed for the investigation of the charges, he may be tried in his absence. In the trial of a local preacher, deacon, or elder, the quarterly conference, or the district conference, having original jurisdiction, may cite the accused to appear before that body for trial; and no previous investigation before a special committee is necessary. This construction is fairly inferable from the provisions of the section before referred to; for it is there provided that the preacher

having charge shall call a committee, who may aquit or suspend the accused, until the next quarterly conference. And because that body has original jurisdiction in the case, where there have been no proceedings before a committee convened by the preacher having charge, regular charges and specifications should be made out, and such local elder, deacon, or preacher notified to appear at quarterly or district conference for the next trial; but where he has been tried before a committee, and suspended until the next quarterly or district conference, the Discipline makes it his duty to appear without any further formal notice; but he should have regular notice of the time and place of the meeting of the committee, where a committee has been convened.

Paragraph 214 of the Discipline requires, that the president shall, at the commencement of the trial, appoint a secretary, who shall take down regular minutes of the evidence of the trial, which minutes, when read and approved, shall be signed by the President, and also by the members of the conference who are present, or a majority of them. By ¶ 215, certain preliminary proceedings are required, in a certain class of offenses, before the party is amenable, for trial, to the jurisdiction of the quarterly or district conference. Thus, in the case of improper temper, words, or actions, not amounting to an offense against the canons of the Church, the person so offending shall be reprehended by the preacher in charge; and for a repetition of the same offense, or one of like character, the preacher in charge is required to select one or more faithful friends of the party transgressing, to act as witnesses that he has been so reprehended; and where such local elder, deacon, or preacher, after having been so admonished, continues to persist in his evil ways, he is liable to be cited for trial at the next quarterly or district conference having jurisdiction of him; and, upon trial, if found guilty and impenitent, he shall be expelled from the Church. By the provisions of ¶ 206 of the Discipline, there is still another preliminary proceeding authorized, when a local elder, deacon, or preacher fails in business, or contracts debts which he is not able to pay. So jealous is the Discipline of every thing that would have the appearance of dishonesty or a reckless disregard of the rights of others, that it is made the duty of the preacher in charge,

in such a case, to appoint three judicious members of the Church to inspect and investigate the accounts, contracts, and circumstances of the supposed delinquent; and if, after investigation by such members, they are of the opinion that such delinquent has behaved dishonestly, or contracted debts without the probability of paying for them, his case should be disposed of by the quarterly or district conference in accordance with the provisions of ¶ 213 of the Discipline, that is, regular charges should be preferred against him, and he should be notified and required to answer as in case of charges of other crimes.

CHAPTER XV.

THE TRIAL OF AN ACCUSED MEMBER.

ACCORDING to the Discipline and usage of the Methodist Episcopal Church, the aggregate body of the Church is composed of separate societies, termed United Societies. These societies are separate and distinct for certain purposes, and united for certain other. The members of one of these societies are said to be members of the Church, and they have all the rights, privileges, and immunities belonging to the Church, conferred on mere members. Yet a member of the Church is only amenable to the society to which he belongs; and where he is charged with the commission of a crime, or is guilty of immoral conduct, he is to be brought to trial before a committee of not less than five, who are not members of the quarterly conference, selected by the preacher in charge; but where it is necessary, the Discipline provides that the selection may be made from any part of the district. That is, it is not necessary that the committee should be members of the same local society, or of the same circuit or station along with the accused. They are competent if they are not members of a quarterly conference within the presiding elder's district. The trial is to be presided over by the preacher in charge, whose duty it is to cause exact minutes of the evidence and proceedings to be reduced to writing, and, when so reduced to writing, the proceedings should be properly authenticated and signed by the preacher in charge and secretary, and when so executed, they become the record in the case.

If a member is accused of a crime cognizable before the regularly constituted authorities of the Church, regular charges and specifications should be made out against him in due form, and, when so made out, the charges and specifications should be signed by some member of the Church. They should not, however, as a rule, be prepared by the preacher in charge, for there is a manifest impropriety in his doing so,[1] in as much as it may become his duty, as president of the trial, to pass upon the sufficiency or insufficiency of the charges or specifications; and he ought to labor to keep his own mind entirely free from bias; in other words, he ought to stand in that relation, both to the Church and to the accused, that each might realize that he is impartial, and will fairly administer the Discipline. The difficulty referred to by Bishop Baker is easily obviated; where the charges are presented to the minister in a rough form, so as to require revision, he ought, if practicable, to refer them, where the party presenting them is not competent, to some third person to reduce them to form, so that they would be legally presentable.

CHAPTER XVI.

THE MODE OF STATING FACTS IN THE COMPLAINT.

A GENERAL statement of facts, which admits of almost any proof to sustain them, in a specification is objectionable. There are cases where a direct and positive averment is necessary to be made in specific terms, as where the law of the Discipline has fixed an appropriate and technical term to describe a crime, or other offense, as murder, burglary, arson, and the like. Except in particular cases, where precise technical expressions are required to be used, there is no rule of law that other words should be employed than such as are in ordinary use; or that in pleading a different sense is to be put upon them from that which they bear in ordinary acceptation; where, however, there has

[1] The administrator of Discipline must, ordinarily, reduce to suitable form the charges and specifications from the rough story of the complainant. To give no attention to any complaints, except such as are presented in due form, is to neglect the greatest number of those requiring the special investigation of the Church. Baker on Discipline, 97.

been a long established form of stating the facts of the particular case, it should in general, for the sake of certainty, be adopted. The principal rule as to the mode of stating facts is, that they must be set forth with certainty, by which is meant a clear and distinct statement of the facts which constitute the cause of complaint. The term pleading (and we use this term in contradistinction to the term argument), as it is used by our civil law writers, may be divided into three sorts. First, to a common intent; second, certainty to a certain intent in general; third, certainty to a certain intent in every particular. Certainty to a common intent may be defined to be that kind of certainty that when words are used that will bear a natural sense, and also an artificial one, or one to be made out by argument or inference, the natural sense shall prevail. It is simply a rule of construction, and not of addition; therefore, common intent can not add to a sentence words which are omitted. This description of certainty is sufficient in a complaint, either against a member of the Church, or a traveling minister, preacher, or bishop.[1]

[1] Certainty to a common intent is sufficient in a special plea, and certainty even to a certain intent according to Mr. Justice Buller, means that which upon a fair and reasonable construction, may be called certain without recurring to possible facts; or when words are used which will bear a natural sense, and also an artificial one, or one to be made out by argument, or inference, the natural sense shall prevail. Buller, J., in *King* v. *Lyme*, Douglass, 159, and *Davaston* v. *Payne*, 2 H. Bl., 530, *Spencer* v. *Southwick*, 9 John. 316.

A plea in bar of the plaintiff's action must be certain to a common intent; it must be direct and positive in the facts set forth, and must state them with all necessary certainty. It is not correct to say that in a plea justifying a libel, because the subject comprehends multiplicity of matter, there may be general pleading in order to avoid prolixity. In 1 Chitty's Pleading, 240, 516, the rule will be found. A rule frequently sanctioned in this court and adjudicated in the court for the correction of errors, 11 John. Rep. 576. The rule to which I allude is laid down in the case of *Anson* v. *Stewart*, 1 Tenn. R., 748. There the action was for a libel, charging the plaintiff with being connected and concerned with a gang of swindlers and common informers. The plea stated that the plaintiff had been dishonestly concerned, and connected with, and was one of a gang of swindlers and common informers, and had also been guilty of defrauding divers persons with whom he had dealings and transactions. On demurrer to this plea, it was decided, that it was bad on account of its generality; that it was contrary to every rule of pleading to charge the plaintiff with swindling, without showing any instances of it; for wherever one person charges another with fraud, he must know the particular instances on which his charge is founded, and therefore ought to disclose them. Ashhurst, J., said one part

It is a maxim of pleading, and may be applicable here, that every thing should be taken most strongly against the party pleading. But in applying this maxim, the rules before stated must be kept in view; particularly those relating to the degree of precision or certainty required in the statement of facts. The language employed should always receive a reasonable construction and intendment; and where expressions are used that are capable of different meanings, that meaning should be adopted which will support rather than defeat the complaint. Every specification or complaint ought to contain, within itself, a complete description of such facts and circumstances as constitute the offense, without inconsistency or repugnancy; and ought to be certain. A statement of time and place should be regu-

of the defendant's argument has been that the plea is only as general as the charges in the declaration. He said it was to be observed that it was the charge of the defendant, and the plaintiff was bound to state it as made, and that it did not follow that the defendant ought to justify it in so general a way. But when he took upon himself to justify generally the charge of swindling, he must be prepared with the facts which constitute the charge, in order to maintain his plea, and then he ought to state those facts, specifically to give the plaintiff an opportunity of denying them; for the plaintiff could not come to the trial prepared to justify his whole life. If the defendant could support his charge it must be known to him, and he must call witnesses to prove particular acts of fraud, and if he could not substantiate the charge, he ought not to have made it. Buller, J., said, "that if the plaintiff had been guilty of any acts of swindling, the defendant must be supposed to know them, that the defendant had no justification unless he could prove the special instances, and knowing them he ought to put them on the record, that the plaintiff might be prepared to answer them." Both judges, Buller and Ashhurst, referred to cases of indictment for barratry, keeping a disorderly house, and as a common scold; and declared them to be peculiar cases, supported by peculiar reasons, but not applicable to the case then under consideration. Buller, J., stated the rule in pleading to be, "that wherever a subject comprehends multiplicity of matters, in order to avoid prolixity, generality of pleading is allowed." But he says if there be any thing specific in the subject, though consisting of a number of facts, they must all be enumerated. I have been thus particular in stating the doctrine advanced by the judges in *Anson* v. *Stewart;* for no case has fallen under my observation impugning the principles there laid down. It would be an alarming doctrine that one man might charge another with stealing generally, and then, by way of justification, plead merely that he was a thief, and had stolen, or that he had stolen from A. or B. or C. Such a plea would be condemned by every sound lawyer as falling far short of a justification. A material and traversable fact must be expressly stated. 2 John. R. 433; 3 John. R. 242. 7 John. R. 75; *Van Ness* v. *Hamilton*, 19 John. 367–369.

larly averred, in each specification, though neither is required to be proved as laid.

In construing a complaint, one specification can not be employed to aid another; but each specification, like several counts in a declaration, or in an indictment, should contain a sufficient statement of facts to constitute the crime within itself; and where a complaint contains several charges, or several specifications, one charge, or one specification, may be adjudged sufficient, and the others insufficient; subject to this qualification, that if the charge is insufficient, as where the charge does not amount to an offense against the canons of the Church, the specifications under such charge, though sufficient in themselves, will be adjudged bad for want of a sufficient charge to support them.

While under this head, there is still a further question to be considered, and that is, that facts only are necessary to be stated and not arguments, or inferences, or matters of law. And there may be a still further qualification of this rule; that is, where the facts are of such a public or general nature that the courts or committee will, *ex officio*, take notice of them, they ought not to be stated in the complaint. Thus the court will, without pleading, take notice of the proclamations of the President of the United States; and the Articles of War, emanating from the Crown, or the President, by virtue of acts of Parliament, or Congress; and also of the privileges of the Crown, or of the President; or, in ecclesiastical law, the privileges of the bishops, or of the head departments of the Church. A Church tribunal will, also, take notice of the time and place of the meeting of the General Conference, and of the annual conferences, and of the course of the procedure in the conferences, and of the disciplinary rules and regulations of the Church. It is said that our civil courts will, *ex officio*, take notice of the ecclesiastical, civil, and marine laws, without any statement of them in pleading, and if there be a misstatement of such laws, and of the facts affecting them, the pleading will be held insufficient. Thus, where an administrator *durante minori ætate* in his declaration averred that the infant was within the age of twenty-one years the declaration was holden bad, because the court would take notice that, by the ecclesiastical law, such administration ceased at the age of seventeen. It it probable that in this country, where the relation

between the Church and the State is not so intimate as in England, that this latter statement would not be correct; and that where a party relies upon an ecclesiastical law, he would be compelled to set the same out in his plea, in like manner as he would be required to set out the laws of a sister State, where such laws are at variance with the common law.[1]

CHAPTER XVII.

THINGS JUDICIALLY TAKEN NOTICE OF WITHOUT PLEADINGS OR PROOF.

THERE are certain things that courts, or rather tribunals, whether civil, military, or ecclesiastical, take judicial notice of without proof; and we will briefly refer to a few of them, as illustrating the rule. Thus, one nation or State takes notice, *ex officio*, of the existence of every other civilized nation or State; and the general, public, and external relation of each to the other, and the usual and appropriate symbols of nationality and sovereignty, such as the flag and seal. Every sovereign, and every public tribunal and functionary, of every nation, takes notice of

[1] In the case of *Walker* v. *Maxwell* (1 Mass. 103), it was held that a defendant who relies upon the statute of another State must, in his plea, set out the statute, that the court may see whether the proceedings were warranted by the statute or not; but that the common law might be considered common to both States, and regulating the proceedings of courts of justice in both.

The question is, whether the proceedings alleged to have been in the State of Vermont are well pleaded? It is laid down by Mr. Chitty, "That courts do not, *ex officio*, take notice of foreign laws, and consequently they must, in general, be stated in pleading." (1 Chitty's Pl. 221.) The question arose in *Callett* v. *Keith*, 2 East, 261, which was an action of trespass for seizing and taking a ship at the Cape of Good Hope, to wit, etc. The defendant, among other things, pleaded that the settlement of the Cape of Good Hope was subject to foreign, to wit Dutch, laws; that the ship was within the jurisdiction of the Supreme Court there, and that certain proceedings were instituted and had; that the defendants, according to the foreign laws of the place, the said court having competent jurisdiction, were authorized and ordered to detain the ship. To this plea there was a demurrer. In deciding the case, Grose, J., said, "That the plea was too general; that it was not enough to state that the vessel was within the jurisdiction of the court, which was governed by foreign laws, and that certain proceedings were instituted; but the defendant should have shown what the foreign law was which gave jurisdiction to the court." *Holmes* v. *Broughton*, 10 Wend. 78.

the existing sovereign powers and titles of all the others in the civilized world; also of public acts, decrees, and judgments, exemplified under their appropriate seals.[1] Courts and public officers in like manner take notice of the laws of nations, and the general customs and usages of merchants, as well as the public statutes and general laws[2] and customs of our own country, as well ecclesiastical as civil. They also take notice of the seal of a notary public; of foreign admiralty and maritime courts; and the co-ordinate jurisdiction of such courts, the same being recognized judicially every-where; and their seals need not be proven. Neither is it necessary to prove things which must happen according to the known course of nature; nor to prove the course of time; nor of the heavenly bodies; nor the coincidence of days of the week with days of the month; nor the meaning of words in the English language; nor any matter of public history, affecting the whole people; nor public matters affecting the government of the country; nor the current coin of the country; nor the territorial extent, jurisdiction, and sovereignty of our own government; nor of the local divisions of the country into States, counties, townships, cities, and towns; nor the relative positions of such local divisions.

[1] The testimony of witnesses, proving the seal of the court, and the signature of the judge, are sufficient to admit the exemplifications (7 John. R. 519); and it seems, from the same case, that proof of the seal alone is sufficient. See, also, Peak's Ev. 48. But the public seal of a State proves itself; it is a matter of notoriety, and may be taken notice of as a part of the law of nations, acknowledged by all. 3 East, 222 N. See, also, 4 Dall. 416. The proceedings of a court of admiralty are sufficiently proved by the seal of the court, the certificate of the judge, and the certificate of a notary, that the person certifying as judge is so in fact. 5 Cranch, 335. *Lincoln* v. *Battelle*, 6 Wendell, 483.

[2] The Circuit Courts of the United States are created by Congress; not for the purpose of administering the local laws of a single State alone, but to administer the laws of all the States in the Union, in cases to which they respectively apply. The judicial powers conferred on the General Government, by the Constitution extend to many cases arising under the laws of the different States; and this court is called upon, in the exercise of its appellate jurisdiction, constantly to take notice of and administer the jurisprudence of all the States. That jurisprudence is then, in no just sense, a foreign jurisprudence, to be proved in the courts of the United States, by the ordinary modes of proof, by which the laws of a foreign country are to be established; but it is to be judicially taken notice of in the same manner as the laws of the United States are taken notice of by these courts. *Owings* v. *Hull*, 11 Curtis, 503–4.

In analogy to these principles the Methodist Episcopal Church will take notice *ex officio* of the government of the Church, and its organization into a General Conference, annual conferences, district conferences, and quarterly conferences; the extent and local divisions of each; the number and names of the bishops, and their executive, ministerial, and judicial authority; and the power and authority of each annual, district, and quarterly conference, and the bishop, president, or presiding officer, or elder, at any given conference; upon the same principle the General Conference will take notice of its officers, at any given conference, the number and names of the members of such conference, and the number of annual conferences under the jurisdiction of the General Conference; but one annual conference will not judicially take notice of who are members of another annual conference.

An annual conference will, however, take notice of the number and names of members of such annual conference; and whether a traveling minister or preacher is on trial or admitted into full connection with the conference. They will also take notice of the number of districts in an annual conference, and who is appointed presiding elder over each district, and the number and names of the members of each district or quarterly conference; so, also, the judicial tribunals of the Church will take notice of the acts, resolves, and resolutions of the General Conference, and all canons of the Church, whether the result of disciplinary rule, or general usage. Each tribunal of the Church will officially, without proof, take notice of their own jurisdiction and authority, and of the jurisdiction and authority of all the other administrative and judicial authorities, connected with any or either of the conferences; and the power and appellate jurisdiction of such tribunals of the Church, as are authorized to sit in revision upon the proceedings of such judicial body, but they will not take notice *ex officio* of the number and names of those who compose special committees, appointed by a general or annual conference, or the power or authority of such committee; neither will they take notice of the fact that a given society is, or is not, incorporated under the laws of the State. But where an annual conference, by virtue of the laws of the State, is incorporated, the conference so incorporated

will judicially take notice of that fact, and all matters of Church history, and of the relation of our own Church to other Protestant Churches, that are on fraternal relations with us, will be judicially taken notice of.

CHAPTER XVIII.

IS AN ECCLESIASTICAL TRIAL CRIMINAL IN CHARACTER?

THIS is a question that is only important to be considered with reference, first, to the manner of conducting the trial; second, to the weight that is to be given to the evidence; and, third, to the character of the judgment, or, sentence to be pronounced. It is true, oftentimes, that the questions involved in a Church trial, or investigation, are questions growing out of the commission of crime of all shades and denomination, from the highest type of treason to the smallest misdemeanors cognizable before our police courts. A Church trial often involves questions that are purely, in the eye of the common law, cognizable before the civil tribunals, using, in this sense, the term civil as contradistinguished from criminal; as where a Church member or preacher is accused of a breach of contract, or a failure to meet his obligations, when he is possessed of sufficient ability so to do; or where he is guilty of a wrong or tort, not amounting in law to a crime; for all wrongs are not redressible in our courts of law, by resort to criminal process; on the contrary, only such torts, as, besides being an individual injury to the party wronged, are also an injury to the public at large. It often happens, where a crime is committed, that the law affords two remedies, one to the party injured, on account of the damage sustained by him, and the other to the public. And when our courts are investigating the civil injury, such investigation of necessity involves an inquiry into the commission of the crime; thus, if one man assaults and beats another, or maims him, he is indictable for the assault or maiming, and he is also liable to the party assaulted for the civil injury. While the trial is for the civil injury, at the suit of the party assaulted, it necessarily requires an investigation of the facts, and all the attending circumstances. It was formerly held that, in case of treason and felonies, it was the duty of the party injured to bring the

traitor or felon to the criminal bar of the court, and to cause him to be prosecuted for the offense; and that by reason of the magnitude of the crime the treason or felony merged the civil remedy, the traitor or felon forfeiting his estate and goods to the crown; therefore, the party injured was without redress. In this country, criminal prosecutions are not conducted, and carried on as in England, exclusively by private individuals, but we have public officers and assistants to represent the Government in these matters. Still we have no substitutes for the individual, in the duty of making disclosures of crimes to the authorities, or ordinarily taking other incipient steps. In this respect the duty of the Church members is somewhat analogous to the duty of the citizen. The Church member should see to it that an offender, especially if the offense be of a grave character, is brought to trial before the proper Church tribunal, and thereby the Church purged of an unworthy member.

In criminal proceedings the people, government, or commonwealth, as they are variously termed, is made the complainant; in civil proceedings the party complaining appears on the record as the complainant. In several places in the Discipline, the parties are spoken of in the sense of plaintiff and defendant, indicating that there is an accuser as well as the accused, so that it is difficult to determine the exact nature of the proceedings. It is certain that there are matters cognizable before a Church tribunal which are purely of a civil nature, as will be seen by reference to the title, "Disagreement in business and non-payment of debts." Under this title it is provided, that in case of disagreement between two or more members of the Church in business transactions, which can not be settled by the parties, the preacher in charge shall inquire into the circumstances of the case, and recommend to the parties a reference to five arbitrators; two to be chosen by each of the parties, and the fifth to be chosen by the four arbitrators thus selected; and upon such recommendation being made, if either party refuses to abide by the judgment of the arbitrators, where an arbitration takes place, and fails to show sufficient cause for such refusal, he shall be expelled; or if a member of the Church shall refuse, in case of debt or other disagreement, to refer the matter to arbitration, when recommended by the preacher in charge, or shall engage in

a lawsuit with another member, before such preliminary proceedings are had, he shall be brought to trial; and if he fails to show that the case is of such a nature as to require investigation, and the prosecution of a suit at law, or in equity, he shall be expelled. So, by the provisions of ¶ 226 and ¶ 227, it is provided, that the preacher who has the oversight of a circuit or station, is required to execute all rules fully and strenuously against frauds and dishonest insolvencies, suffering none to remain in the Church, on any account, who are found guilty of fraud; and, to prevent scandal, when any member fails in business or contracts debts which he is not able to pay, two or three judicious members should be appointed, by the preacher in charge, to inspect the accounts, contracts, and circumstances of the case of the supposed delinquent; and if, upon such investigation, they come to the conclusion that he has acted dishonestly, or borrowed money without a probability of repaying it, he shall be brought to trial, and, if adjudged guilty, expelled.

Notwithstanding these provisions contained in the Discipline, taking into view the entire scope of the Discipline, and the views expressed by Bishop Baker, and others, it would seem that proceedings, instituted for the trial of a bishop, traveling preacher, other preacher, or member, have been regarded as analogous to a trial for crime in our civil courts; and this view is not wholly without reason. The prosecution is commenced and carried on, or it ought to be at least, in the name and by the authority of the Church, for the vindication, not of private rights, nor for the redress of private wrongs, but for the purpose of purging the Church from all moral impurities, so that she may be in practice what she professes to be in theory, the bride of Christ. We have said that there is a difference to be observed in the form of procedure, provided that we follow the analogies of the criminal law, rather than the civil. By the criminal law a greater degree of strictness is required than by the civil law. No amendments are allowed to be made, in either information or an indictment; the one being presented by the Attorney-general, or the prosecuting attorney, and the other by a grand jury. In some of the States, however, the rigor of the common law, in this respect, has been changed, and amendments are now allowed the same in criminal as in civil procedure. Probably the better practice

would be to allow charges and specifications, presented to the judicatory of the Church, to be amended. Amendments might often avoid the necessity of vexatious delays; for if a complaint can not be amended when it is defective, the objection can be ordinarily obviated by the dismissal of the proceedings, and the institution of further proceedings, founded upon a new complaint.

There is no difference in the rules of evidence between a civil and a criminal case, except in this, that in civil cases the jury are allowed to weigh the evidence, and to render their decision, based upon a preponderance of the evidence;[1] but in criminal cases the accused is entitled to every reasonable presumption that can be drawn from the evidence in favor of his innocence; and he should not be convicted unless the evidence is so strong that it would exclude every hypothesis except that of the guilt of the accused; or, in other words, the jury should not, in a criminal case, weigh the evidence; for if the evidence is of such a character that it is required to be weighed by the jury, then they should find the defendant not guilty.

There is still a further question that remains to be considered, drawn from the analogies of the criminal law, and that is, as to the effect of the finding of the committee. It is a rule, recognized by the common law, and made a part of the organic law of almost every State in the Union, that a party shall not be put in jeopardy the second time for the same offense.[2]

Therefore, a plea of *autrefois acquit*, formerly acquitted, or *autrefois convict*, formerly convicted,[3] is a good plea in bar to an

[1] *United States* v. *Winchester*, 2 M'Lean, 135; *United States* v. *M' Comb*, 5 M'Lean, 286.

[2] It is a principle prevailing in probably every system of jurisprudence, certainly in ours, that when a matter has been fairly passed to final adjudication, it can not be litigated in any fresh suit, between the same parties; but according to the general doctrine, this rule does not prevent a re-hearing of the cause in proper circumstances. In the criminal law, however, the general right to a re-hearing is restrained by another principle embodied in the common-law maxim, "That," as Blackstone expresses it, "no man is to be brought into jeopardy of his life more than once for the same offense." 1 Bishop's Criminal Law, 826.

[3] Chitty lays down these rules: That to entitle a defendant to this plea, it is necessary that the crime charged in the first and second indictments should be the same; and that if the crimes charged in the first and second indictments are so distinct that evidence of one will not support the other, a conviction or acquittal of one will not bar a prosecution of the other. 1 Chitty's Criminal

indictment. And the same principle ought to apply in case of a Church trial before an ecclesiastical tribunal; though it was held, in one case, by the Supreme Court of New York, that it was not illegal that a medical society should consider the subject of the charges, after having once acted in the matter, without pronouncing them well founded. For this accusatory power is like that of a grand jury, and it is undeniable that a complaint may be, and frequently is, referred to successive grand juries; and the fact that the medical society acted upon extra judicial information is an additional reason why they should not be precluded from a second inquiry; but whatever doubt there may be, as to the legal effect of a Church trial, there can be none as to the fact that it is perfectly competent for a Church tribunal to treat their own adjudications as final, and the civil court would follow their decisions, in giving construction to their own canons; and such we understand to be the rule of construction, as settled in the Methodist Episcopal Church; though the same conclusiveness of character is not given, even by the Church or by the common law, where it is not a trial, but a mere preliminary investigation.[1]

Law, 456. Another rule is stated to be, that unless the first indictment is such that the defendant might have been convicted upon proof of the facts alleged in the first indictment, an acquittal or conviction on the first can be no bar to the second. 2 Russell on Crimes, 41. Archbold states this rule as follows: "The true test, by which the question whether the plea is a bar in any particular case, may be tried, is, whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first."

But the authorities cited, and the illustrations given in support of the rule as stated, all show, that to make the plea a bar, proof of the facts alleged in the second endictment must be sufficient, *in law*, to have warranted a conviction on the first indictment of the same offense charged in the second, and not of a different offense. Archbold's Crim. Pl., 82, and cases there cited; or, in other words, the party must have been in peril of being convicted upon the first prosecution of the same offense described in the last. Greenleaf states the rule to be: That if the defendant, upon the first indictment, could not have been convicted of the offense described in the second, then an acquittal or conviction upon the former is no bar to the latter. 3 Greenleaf Ev., Sec. 36. And this we hold to be the true rule. If the defendant could not, by any legal possibility, have been convicted on the former prosecution of the offense charged in the second, he can in no just sense be said to be in peril of a second conviction on the same offense. *Freeland* v. *The People*, 16 Ills., 382.

[1] When the grand jury have heard the evidence, if they think it a groundless

We have said that under the humane provisions of the common law a party was not liable to be put in jeopardy the second time for the same offense. As this provision of law was adopted for the benefit of defendants, they are therefore at liberty to waive their rights under it. The doctrine that a man may waive a legal privilege in his favor is familiar in every department of law. For example, where a statute directs in what county a defendant shall be sued, he may still, if sued on a private demand in the wrong county, answer there to the action on its merits, and by answering he waives his opportunity to object. Anciently prisoners were denied counsel in their trials, and then the judges counseled them to the extent of their doing things prejudicial, except to plead guilty. After the practice was changed as to counsel, the court decided that even in capital trials, defendants acting by legal advice under the supervision of the tribunal, might so consent to an arrangement, manifestly for their benefit, as afterward to be bound by it.

The doctrine that a man is not liable to be tried twice for the same offense is subject to certain qualifications; where a person has offended against two governments, although the offense consisted of a single act, he is liable to be be punished by both.[1]

accusation, they used formerly to indorse on the back of the bill "*ignoramus*," or, we know nothing; intimating that though the facts possibly might be true, that truth did not appear to them, but now they assert, in England, more absolutely, "not a true bill." or (which is the better way) "not found," and then the party is discharged without further answer. But a fresh bill may afterwards be preferred to a subsequent grand jury. If they are satisfied with the truth of the accusation, they indorse upon it, "a true bill;" anciently, "*billa vera*." The indictment is then said to be found, and the party stands indicted. But to find a bill, there must be at least twelve of the jury agree; for so tender is the law of England of the lives of the subjects, that no man can be convicted, at the suit of the King, of any capital offense, unless by the unanimous voice of twenty-four of his equals and neighbors; that is, by twelve at least of a grand jury, in the first place, assenting to the accusation, and afterwards by the whole petit jury of twelve more finding him guilty upon his trial; but if twelve of the grand jury assent, it is a good presentment, though some of the rest disagree; and the indictment, when so found, is publicly delivered to the court. 4 Blackstone's Com. 305–6.

[1] In a case on the circuit before the late Chief-Justice Taney, of the Supreme Court, where there was a conviction of the defendant for robbing the United States mail, this learned judge said: "As these letters with the money within them were stolen in Virginia, the party might undoubtedly have been punished in the State tribunals, according to the laws of the State, without any reference

Where the offense involves a civil injury, the party inflicting such injury is liable to be prosecuted criminally for the offense, and proceeded against civilly, as we have previously shown, by the party injured. The meaning of the rule is, that the party shall not be liable to be twice prosecuted criminally by the same government for the same offense. A member of the Church is liable, where he has committed an offense, to be prosecuted criminally before the civil court, sued by the party injured for the damage that such party has sustained, and proceeded against canonically. And the one is no bar to the other. Neither are the proceedings in the one case, or before one of the tribunals,

to the post-office, or to the act of Congress; because, from the nature of our Government, the same act may be an offense against the laws of the United States, and also of a State, and be punishable in both. And the punishment in one sovereignty is no bar to his punishment in the other. Yet in all civilized countries, it is recognized as a fundamental principle of justice, that a man ought not to be punished twice for the same offense. And if this party had been punished for the larceny by a State tribunal, the Court would have felt it to be its duty to suspend sentence, and to represent the facts to the President, to give him an opportunity of ordering a *nolle prosequi* or granting a pardon." *United States* v. *Amy*, 14 Md. 149, note 152.

An offense, in its legal signification, means the transgression of a law. A man may be compelled to make reparation in damages to the injured party, and be liable also to punishment for a breach of the public peace, in consequence of the same act; and may be said in common parlance, to be twice punished for the same offense. Every citizen of the United States is also a citizen of a State or Territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offense or transgression of the laws of both. Thus an assault upon the marshal of the United States, and hindering him in the execution of legal process, is a high offense against the United States, for which the perpetrator is liable to punishment; and the same act may also be a gross breach of the peace of the State, a riot, assault, or a murder, and subject the same person to a punishment under the State laws, for a misdemeanor or felony. That either or both may (if they see fit), punish such an offender, can not be doubted. Yet it can not be truly averred that the offender has been twice punished for the same offense; but only that by one act he has committed two offenses, for each of which he is justly punishable. He could not plead the punishment by one in bar to a conviction by the other; consequently, this Court has decided, in the case of *Fox* v. *The State of Ohio*, 5 How. 432, that a State may punish the offense of uttering or passing false coin as a cheat or fraud practiced on its citizens; and, in the case of *The United States* v. *Marigold*, 9 How. 560, that Congress, in the proper exercise of its authority, may punish the same act as an offense against the United States, *Moore* v. *The People of the State of Illinois*, 20 Curtis, 9.

admissible in evidence before the other, except so far as it may be competent to prove the acts, or the admissions of the party. For it is well settled that before verdicts and judgments are admissible in evidence, they must be between the same parties, and have reference to the same subject matter. In the case we have instanced, while the subject matter is the same yet the parties are different, the people or the Government are the complainants in a criminal prosecution; the Church in an ecclesiastical investigation and the party injured in a civil suit for compensation.

CHAPTER XIX.

LIMITATIONS ON PROSECUTIONS.

BISHOP BAKER, in his work on the Discipline, says: "That any crime committed, at however remote a period, if it be within the time in which the accused has been a member of the Church, is indictable, but it can not be extended to any period beyond membership." While this may be technically true, and while we do not propose to call in question directly the correctness of this rule as it is laid down by so eminent an authority, yet the remoteness of time at which a crime is alleged to have been committed should always be taken into consideration by the administrators of the Discipline; it is probably true that the bar of the statutes of limitations, as it has been fixed by statute in every State of the Union, and in England, would not constitute a technical estoppel; but the objection that if the party was prosecuted before the civil courts for the same offense he could not be found guilty should have great weight in determining the question of guilt or innocence in the mind of the Committee.

These statutes are not wholly arbitrary, as many imagine, but owing to the fact that remoteness of time and the infirmity of human memory often obscure the transaction, and obliterate many of the traces of fact that give tone and character to the principal facts, experience has proved that there ought to be some limitation. We suggest, without laying it down as a rule to govern in the administration of ecclesiastical law, that while the Church would not be bound to adopt the analogies of the law in this respect, it might be well to adopt the rule recognized in

courts of equity, which is, that equity adopts and follows the rules of law in all cases to which those rules may in terms be applicable, and that it adopts, in the administration in cases of an equitable nature, the analogies furnished by rules of law; thus where a rule, either of the common or the statute law is direct, and governs the case with all its particular circumstances, a court of equity is as much bound by a statute of limitation as a court of law, and can as little justify a departure from it. Thus, although the statutes of limitation are, in their terms, applicable to the courts of law only, yet equity by analogy acts upon them, and refuses relief under like circumstances. It is said that equity always discountenances laches; and holds that laches is presumable in cases where it is positively declared at law. There are, however, cases in which the statutes would be a bar at law, but in which equity would, notwithstanding the legal bar, grant relief.

And on the other hand there are cases where the statutes would not be a bar at law, but where equity would be justified in refusing relief. Upon examination it will be found that such cases rest upon peculiar circumstances, which courts of equity can take notice of, but which courts of law would be bound by the positive bar of the statute. Thus, where the demand is not of a legal nature; or where the offense in an ecclesiastical court is not one that is *malum in se*, but is purely of an equitable or of an ecclesiastical character, or where the bar of the statute is inapplicable, courts of equity, and the tribunals of the Church, may employ another rule, founded sometimes upon the analogies of the law, where such analogies exist, and sometimes upon their own inherent doctrine, not to entertain stale or antiquated matters, nor to encourage laches and negligence. These rules are founded upon considerations of public policy, from the difficulty of doing entire justice, when the original transactions have become obscured by time, and the evidence may be lost; but, under peculiar circumstances, however, excusing or justifying the delay, courts of equity, and ecclesiastical courts, will not refuse an investigation in furtherance of justice.[1]

[1] In the case of *Raes* v. *Bogart*, 2 John. Cas. 432, the Court of Errors confirmed a decree of this Court, dismissing a bill for an account by reason of delay and lapse of time, and the death of parties, and the probable loss of papers,

"Charges of immorality against preachers should not be restricted to the time which they have been in the ministry," says Bishop Baker in his work on the Discipline; and this we think is right; but in the administration of the Discipline, on this point, a very important question arises: Can a minister be tried by lay members for an offense that he committed before he was licensed to preach, or should he be tried by the conference of which he is a member at the time the charges are preferred, without any reference to the relation he sustained to the Church at the time the charge alleges the offense to have been committed? It is difficult to find any direct authority upon this question. A very strong argument may be interposed in favor of the jurisdiction of the conference, as that body is both *quasi* judicial and deliberative; and as such, clothed with the sovereignty of the Church, and specially charged with the care of all that is dear to a traveling minister. Besides, it is usually composed of the most distinguished citizens, selected on account of their purity of life and ability. Again, their actions and deliberations are open to public inspection and criticism. On the other hand, it can be urged with equal propriety and cogency of reason, that the Discipline has divided the administration of the Church into different departments. It has rendered a traveling minister or preacher amenable for offenses that he has committed while he sustained that relation to the conference of which he is a member. And if he is only on trial when charged with the commission of an offense, he is to be tried by the quarterly conference; or if a local preacher, deacon, or elder, by the district or quarterly conference; and if

though the real laches in that case was only for eleven years. The case of *Sturt* v. *Mellish*, 2 Atk. 610, is a strong one to show the unwillingness of the court to decree an account, when the transactions have become obscure and entangled by delay and time. There is no certain and definite rule on the subject. Each case must depend upon the exercise of a sound discretion arising out of the circumstances, *Rayner* v. *Pearall*, 3 John. Ch. 586.

Where the parties lived in the same county, and without accounting for the delay, the plaintiff suffered a period of twenty-six years to elapse from the termination of the American war till the time of filing his bill, it would not be sound discretion to overhaul accounts in favor of a party who has slept on his rights for such a length of time; especially against the representatives of the other party who have no knowledge of the original transaction. It is against the principles of public policy to require an account after the plaintiff has been guilty of so great laches, *Ellison* v. *Moffatt, et al.*, 1 John. Ch. 50.

he is simply a lay member, he is to be tried before his peers as laymen. The fact that his relationship is changed can not, by force of such change, deprive the administrators of the Discipline, having jurisdiction of him, of their right to try him, and pronounce sentence upon him the same as though he had continued his relationship to the society; unless it be that the change of relationship produces a change of membership; for, as we have previously seen, membership of the Church and of the society is necessary to confer jurisdiction. And if his membership has been transferred from the local society to the conference, it is difficult to see how he can be tried at all, unless he is amenable to the conference. There is an analogy for this view of the question to be drawn from the construction that has been placed on the law of impeachment under the Constitution of the United States. "There seems," says Mr. Justice Story, "to be a peculiar propriety, in a Republican Government at least, in confining the impeaching power to persons holding office. In such a government all the citizens are equal, and ought to have the same security of a trial by jury for all crimes and offenses laid to their charge when not holding any official character." [1]

[1] The Fourth Section of the Second Article of the Constitution of the United States provides that the President, Vice-President, and all civil officers of the United States shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors.

From this clause it appears that the remedy by impeachment is strictly confined to civil officers of the United States, including the President and Vice-President. In this respect it differs materially from the law and practice of Great Britain. In that kingdom, all the king's subjects, whether peers or commoners, are impeachable in Parliament; though it is asserted that the commoners can not now be impeached for capital offenses, but for misdemeanors only. Such kind of misdeeds, however, as peculiarly injure the commonwealth by the abuse of high offices of trust, are the most proper, and have been the most usual grounds for this kind of prosecution in Parliament. There seems a peculiar propriety, in a Republican Government at least, in confining the impeaching power to persons holding office. In such a government all the citizens are equal, and ought to have the same security of a trial by jury for all crimes and offenses laid to their charge, when not holding any official character. To subject them to impeachment would not only be extremely oppressive and expensive, but would endanger their lives and liberties, by exposing them, against their will, to persecution for their conduct in exercising their political rights and privileges. Dear as the trial by jury justly is, in civil cases, its value as a protection against the resentment and violence of rulers and factions, in criminal

In the case of William Blount, who was arraigned before the Senate of the United States, in Philadelphia, in 1799, the question was distinctly presented; whether, under the Constitution of the United States, any acts are impeachable unless committed under color of office, and whether the party can be impeached therefor after he has ceased to hold office. Belknap, Secretary of War, tried before the Senate of the United States, in 1876, charged with bribery and corruption, was defended upon this latter ground; that the Senate of the United States had no jurisdiction, his resignation having been tendered and accepted before the Articles of Impeachment were preferred. The Senate divided in opinion, and no direct decision was reached upon this question, until after a hearing on the merits, when he was acquitted for want of jurisdiction. A learned commentator seems to have taken it for granted, that the liability of impeachment extends to all who have been, as well as to all who are, in public office.[1] The same learned commentator, in speaking of the character of offenses, says: "It is confined in general to those offenses which can not be committed equally by a private person; but that such offenses as murder, perjury, robbery, and indeed all offenses not immediately connected with the office, except they are expressly named, can not be regularly inquired into, except for the purpose of expelling the member."

The offense of a minister, while he occupies that relation, is

prosecutions, makes it inestimable. It is there, and there only, that a citizen, in the sympathy, the impartiality, the intelligence, and the incorruptible integrity of his fellows impanelled to try the accusation, may indulge a well founded confidence to sustain and cheer him. If he should choose to accept office, he would voluntarily incur all the additional responsibility growing out of it. If impeached for his conduct, while in office, he could not justly complain, since he was placed in that predicament by his own choice; and, in accepting office, he submitted to all the consequences. Indeed, the moment it was decided, that the judgments upon impeachments should be limited to removal and disqualification from office, it followed as a natural result, that it ought not to reach any but officers of the United States. It seems to have been the original object of the friends of the national government to confine it to these limits; for in the original resolutions proposed to the convention, and in all the subsequent proceedings, the power was expressly limited to national officers. 1 Story on Con. Sec. 790.

[1] Rawle on the Constitution, Ch. 22, page 213. See, also, Blount's Trial, pages 49–50.

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of a graver character than the offense of a mere member. The minister not only offends against the law of God and the canons of the Church, but he is guilty of the violation of a sacred trust, that is conferred upon him when he takes his vows of ordination; and no man who has been guilty of an offense ought to aspire to the position of a minister of the Gospel, and to admission into the conference, without repentance and confession; so that the conference, when he is received, would be cognizable of the facts; but where he conceals such facts, which, if known, would have excluded him from admission, he is guilty of a moral fraud and imposition, and the conference, for the purpose of dealing with him, would be justified in regarding the crime with which he stands charged as a continuing one, so as to render him amenable to their jurisdiction. If the other construction, growing out of the question that we have been considering, should be adopted, and a preacher can be tried and convicted by a lay tribunal for an offense that he has committed while he sustained a lay relation to the Church, what is the effect of such conviction upon him, with reference to the relation that he sustains to the conference? is the record of conviction conclusive evidence of his guilt? or may the conference, notwithstanding the finding of the lay committee or quarterly conference, inquire into the matter *de novo?* By analogy to the rules of law, we think that the action of the committee ought to be held conclusive. Such being the fact, the conference would have but one duty to perform, and that would be to suspend him from all ministerial services and Church privileges. Neither under such circumstances could the conference review the action of the committee or quarterly conference, except to the extent of submitting the questions of law, decided by the quarterly conference, to the bishop while presiding in the annual conference.

There is still another question, growing out of the complex relation of one conference with another, that is worthy of consideration. In analyzing the judicial powers conferred upon the different officers and conferences by the Discipline, there is a difficulty in determining who shall have jurisdiction over a traveling minister or preacher who has taken a transfer from one conference to another; or where a member has changed his membership from one society to another, where the offense is alleged to

have been committed before such transfer or change was effected. We have said, on the authority of Bishop Baker, that the party accused is liable to be tried for the offense. But where tried? By the original society or conference against whom he has immediately offended,[1] or by the society or conference having jurisdiction over him at the time the charges are preferred. There is great propriety, we think, in holding him for trial before the society or conference where the offense was committed, but in doing so, we necessarily encounter the very difficulties that we have been considering. These questions have not often arisen in practice, and yet it is evident that they are liable to arise at any time; and it is equally evident that further Church legislation is requisite in order to a proper solution of the difficulties. It is a wise legislator that anticipates and provides for the solution of difficulties before they arise.

CHAPTER XX.

PROCEEDINGS PRELIMINARY TO A TRIAL.

If a preacher or a member is accused of a crime, cognizable before the regular constituted authorities of the Church, regular charges and specifications should be made out against him in due form, and when so made out, the charges and specifications

[1] It is a principle clearly recognized by the Discipline of our Church, that no member in full connection can be dropped or expelled by the preacher in charge until the select committee or society of which he is a member declares in due form that he is guilty of the violation of some Scriptural or moral principle, or some requisition of Church covenant. The restrictive rules guarantee both to our ministers and members the privilege of trial and appeal; and the General Conference has explicitly declared that it is the right of every member of the Methodist Episcopal Church to remain in said Church unless guilty of the violation of its rules; and there exists no power in the ministry, either individually or collectively, to deprive any member of said right. (General Conference Journal, 1848, page 73.) The fact that the member was guilty of the violation of the rules of the Church, must be formally proved before the body holding original jurisdiction in the case. If the administrator personally knows that the charges are substantially true it does not authorize him to remove the accused member. The law recognizes no member as guilty until the evidence of guilt is duly presented to the proper tribunal, and the verdict is rendered. Baker on the Discipline, 92–93.

should be signed, either by a member of the conference or of the Church. The charges and specifications, when thus made out and signed, should be presented to the preacher in charge of the circuit or station, or other presiding officer selected to preside at the trial. Until they are so presented, such preacher in charge has no authority to take any step or proceed in any manner with the investigation. Such charge or charges are jurisdictional, and the foundation upon which the investigation is authorized. If the charges and specifications are insufficient, the preacher may disregard them or direct them to be put in form.

The charges should be drawn so as to indicate the offense, or crime, that the accused member is charged with being guilty of. Each charge should regularly be accompanied with one or more specifications, setting forth the particular offense, in such a manner as to apprise the party of the nature and character of the crime alleged against him; the same particularity is not requisite in the preparation of charges and specifications, as by law is required in an indictment. The same charge may be accompanied with several specifications, but each specification, in order to be legally sustainable, must be germane to the charge. It need not charge an offense of equal degree; thus, under the charge of murder, one specification may charge the killing to be with malice aforethought, another specification may be a charge of killing without malice aforethought. In our civil courts two or more offenses are not joinable in one indictment, except that they admit of the same character of trial and punishment. Thus, a man may be indicted for selling intoxicating liquors to two or more persons on different days, and all of the offenses may be included in the same indictment; but a man can not be convicted on the same indictment for selling intoxicating liquors without a license upon one count, and for larceny upon another; but he may be indicted in one count for burglary, and in another count of the same indictment, for larceny, provided the larceny accompanied the burglary. In a Church trial, however, no such nice shades of distinction should be recognized; a complaint charging different offenses would undoubtedly be held sufficient, if the complaint was in other respects regular and legal.

After the complaint is prepared and signed, the presiding officer or preacher in charge, should fix a time and place for the

trial, having reference to the convenience and wishes of the accused, as far as is practicable. The accused should be regularly notified of the time and place fixed for the trial; the notice should be in writing, and accompanied with a copy of the complaint, or charges and specifications. The notice should also be served by copy, a sufficient length of time before the trial, to enable the accused member to come prepared for trial on the day fixed. What is a sufficient length of time is not determinable from the Discipline, but may depend upon the circumstances of each particular case. A reasonable notice is all that the law requires. If the accused member or preacher appears, and proceeds to trial, without a formal written notice, or without being served with a copy of the complaint, his doing so amounts to a waiver of all irregularities in the giving of the notice, or of the sufficiency of the notice. All objections which are of a dilatory character, and which do not lead to a decision of the merits of the controversy, should be regularly presented, and insisted on in apt time, that is, before the impaneling of the committee and the commencement of the trial.

By the common law, there was a certain order in which every step, from the time of filing the precipe until the time of the rendition of final judgment was required to be successively taken. And we will briefly refer to a few of these, in order to indicate our meaning: First, the claim of conusance; Second, appearance; Third, oyer; and, Fourth, imparlance. The first conusance was, in form, a question of jurisdiction between two courts, and must be regularly made by the court claiming jurisdiction on the first appearance of the parties, and before the defendant interposed any defense; for if the claim of conusance was not put in before a defense was interposed, it was regularly waived. Again, appearance and defense was the next step in the cause, and a defendant was not allowed to ask oyer; that is, that the deed, or other writing set out in the pleading, be read to him until after his appearance was properly entered; neither was he entitled to an imparlance, which was, in the common signification of the term, time to plead, until after oyer; and where it was demanded in any one of these several successive steps, all prior privileges were held to be waived. Upon the same principle, a defendent was required, if he desired, to plead

several successive pleas in the following order: First, to the jurisdiction of the court; Second, to the disability of the person, (1), to the plaintiff; (2), to the defendant; (3), to the count or declaration; (4), to the writ; and, (5), to the action itself, in bar thereof.

While it is true, that in a Church trial the defendant is required to make no formal pleas, yet there is great propriety in adhering to the fixed rules, indicating the order in which business should be brought forward, so as to avoid all mere technicalities when the matter comes to be submitted to the committee.

After all the preliminary steps have been taken successively or waived by the parties, either expressly or impliedly, before proceeding to the trial, either party, after the committee has been assembled or the judicial conference convened, in the presence of the presiding officer, or the preacher in charge, unless otherwise regulated by the Discipline, may challenge any member of the committee or of the conference, before which he is to be tried, for cause. And in some instances a peremptory challenge of a certain number is allowed to the accused. The Discipline uses the term "challenge for cause," but it nowhere defines, or attempts to define, the term. And in order to a proper understanding of the question we are compelled to have recourse to the common law. The simple fact that the accused is not satisfied with the committee, or any member thereof, is not a ground of challenge for cause within the meaning of the Discipline; but if a member of the committee is related, either by blood or marriage, to either of the parties, or if a member of the committee was a member of the general or annual conference, or of a district or quarterly conference, such fact would constitute a good ground for "challenge for cause;" or if a member of the committee had heard a statement, or what purported to be a statement, of the facts, and had made or expressed an opinion as to the guilt or innocence of the accused, this would constitute cause, within the meaning of the Discipline. A mere bias, however, unless it amounted to a legal disability, is not sufficient.

The objection to a member of the conference, or of a committee, on the account of legal disability, should be regularly inquired into and insisted upon before the commencement of the trial or investigation; for if either party should neglect or refuse to

examine the committee of the conference at the proper time he would not be permitted to do so afterwards; for it is a right that may be waived, and the party will be held to have waived it, unless he makes the objection in apt time; for a party should never be permitted to take advantage of his own laches, or to insist upon right founded upon his own remissness; neither will a party be allowed to experiment with the court, or with a Church tribunal, by waiving the objection, if it is in his favor, or by insisting upon it if the finding is against him.

After the committee is impaneled, or the conference is convened, it is the privilege of the prosecution to state the case to the committee or conference, together with such facts and circumstances as the prosecution expects to prove, avoiding as far as possible the statement of any fact which would be immaterial, irrelevant, or not admissible in evidence. After the prosecution has concluded its statement of the case, the defendant, or accused, has the right to make his statement, and bring forward his theory of the transaction about to be inquired into. This should always be done with prudence and care; for it often happens that the statements of the defendant, or the defendant's counsel, when taken in connection with the facts and circumstances proved on the trial, afford strong evidence of guilt; this statement of the defendant may be made before any evidence is introduced on the part of the plaintiff for prosecution, or after the evidence on the part of the prosecution is closed. We have said that the prosecution is entitled to make the opening statement, and this is generally true; but there may be cases in which the accused, or the defendant, has assumed the burthen of the issue, and where that is the case, as where the defendant admits the facts as charged, but seeks to justify them, he is entitled to begin; and the party having the opening, or having assumed the burthen of proof is entitled not only to begin, but to conclude both the evidence and the argument.

In our civil courts, and especially where they are Courts of Record, causes, whether civil, criminal, or equitable, are usually managed and conducted by regular licensed attorneys, or counselors at law, or solicitors in chancery. This privilege conferred upon the legal profession does not operate to exclude a party from the management of his own cause; for that right is guar-

anteed to him by the Constitution of every State in the Union, and also by the Federal Constitution. The right to employ the assistance of others, however, is restricted to those who are legally qualified. By an examination of the Discipline, it will be seen that this same principle is recognized. In an annual conference, in a judicial conference, and in the General Conference, the party engaged to act for another must be a member of such conference, or of an annual conference. In other judicial investigations, involving mere membership, the party authorized to represent another must at least be a member of the Church.

PART THIRD.

EVIDENCE.

CHAPTER I.

UNDER this head, which is by far the most important part of a Church investigation or trial, we propose to consider those general rules that experience and the wisdom of ages have demonstrated as important guides to the attainment of truth. Every science has its rules of investigation, the ultimate object being the attainment of truth, whether it be the solution of a mathematical truth, that is capable of demonstration, or a moral truth, which is incapable of demonstration, except to satisfy the conscience of the tribunal before whom the investigation takes place. The rules of evidence are the means employed for the attainment of this object.

Evidence adduced before a committee of the Church or before a jury upon controverted questions of fact is of two kinds; parol evidence, consisting of *viva voce* examination of witnesses, and written evidence. We shall first consider the subject of proof by witnesses, and the principal rules relative to evidence, applicable to this class of investigation; in the second place, we shall treat of the subject of written evidence; and in the third and last place, consider certain principles of the law of evidence of a practical nature, such as the means of procuring the attendance of witnesses before a Church tribunal, and the methods of examining witnesses, and other evidence.

CHAPTER II.

INCOMPETENCY OF WITNESSES.

THE parties are not permitted, according to their own notions, to introduce every description of evidence, which may be supposed to throw light upon the matter in dispute. The evidence must be both competent and relevant; otherwise, if brought forward, it would oftener lead to error than to truth; and the attention of the committee might be diverted by the introduction of irrelevant or immaterial evidence; and the investigation often extended to a most inconvenient length, thereby bringing just reproach upon the tribunal before which the investigation is held. In analogy to proceedings before our civil tribunals it is the province of the preacher in charge, or other presiding officer, to decide all questions arising on the admissibility of evidence; also to decide any preliminary question of fact, however intricate or complicated the question may be, the solution of which may be necessary to enable him to determine the legal question of admissibility. Whether there be any evidence or not, is a question for the judge or presiding officer; whether the evidence is sufficient to support the charge is a question for the jury or for the committee.[1]

Chief-Justice Story defined, with his usual great ability, the true boundary between the court and the jury; he says: "I hold it to be the most sacred constitutional right of every party accused of a crime, that the jury should respond as to the facts, and the court as to the law. If the jury were at liberty to settle the law for themselves, the effect would be most uncertain from the different views which different juries might take of it; but, in case of error, there would be no remedy or redress by the party injured, for the court would not have any right to review the law, as it had been settled by the jury. Indeed, it would be almost impracticable to ascertain what the law, as settled by the jury, actually was. On the contrary, if the court should err, in laying

[1] *Carpenter* v. *Hayward*, Doug. 374; Best's Principles of Evidence, §§76–86; in the case of *United States* v. *Baltiste*, 2 Sumn. 243.

down the law to the jury, there is an adequate remedy for the injured party."[1]

The law excludes some descriptions of evidence, and wholly rejects the testimony of certain persons, who are termed incompetent witnesses.[2] In considering this question it is necessary to refer to the difference which necessarily exists between judicial investigations, and the ordinary affairs of life. In the one case there is but a brief space of time allotted for the investigation. Again, the temptation to deceive, the facilities for deception, and the consequences of deciding erroneously, require the utmost degree of caution and circumspection.

The rules adopted for the admission or exclusion of witnesses, do not profess to be infallible tests of credibility. Their propriety must be judged of by their general practical results. A witness is deemed incapable to give evidence at all, (first) when he labors under a defect of understanding; (second) a defect of religious principle,— if he does not acknowledge the sanction of religious obligation upon his conscience; (third) where his character is infamous in consequence of a conviction of some infamous crime; and (fourth) it was formerly held that where the witness was interested in the matter he was incompetent,[3] but this ground of incompetency is now, in our civil tribunals, restricted to a very narrow limit, and has no application to a Church investiga-

Levi v. *Mylne*, 4 Bing. 195; *Commonwealth* v. *Porter*, 10 Metcalfe, 263.

The Court were asked to charge that the jury were judges of the law and facts. The Court refused to instruct in this form, but said the jury had the power, and, if they chose to exert it, the right, to determine all questions of law and fact, so far as to acquit; and, if they did so, there was no power to correct any error committed by them in such acquittal, and that they were not exclusive judges of both law and fact, as a general rule, in criminal prosecutions; for, if they found the accused guilty, and it turned out that their finding was illegal, they had no power, but the Court had, to set aside their verdict and grant a new trial. *Montgomery* v. *State of Ohio*, 11 Ohio Reports, 427.

[2] The law forbids such testimony because it may have an influence upon honest jurors, who are unconscious of the impressions which they retain, notwithstanding the effort of the Court to obliterate them. *Penfield* against *Carpenter*, 13 John. 349.

[3] Competency is presumed till the contrary is shown, but the interest once being established, it should be clearly removed; and where the witness leaves the question doubtful on the facts stated, and the judge at *nisi prius* rejects the witness, the Court in bench may refuse to grant a new trial. *Seymour* v. *Beech*, 11 Conn. 272–181.

tion or trial; and upon a Church trial, every witness who is not laboring under any or either of the first three preceding grounds of disability is competent.

Incompetency from defect of understanding arises where a person has not the use of his reason because of a mental infirmity; such person is utterly incapable of giving evidence, and is, therefore, excluded. This ground of exclusion, which arises from a defective understanding, is where there is a natural deficiency of intellect; as in the case of an idiot, or where the mind has become diseased, as in the case of an insane person; or where the mind is immature, as in children. Such persons are wholly incapable of comprehending the nature of the obligation imposed upon them, and are incompetent witnesses. It was formerly supposed, but now held otherwise, that persons born deaf and dumb were incompetent; but now the same tests apply to them that are applied to any other persons offered as witnesses. If they have sufficient understanding to comprehend the nature of an oath, they may be examined as witnesses through the medium of an interpreter; or if they are able to write their testimony, it should be taken in that mode, as the more certain. A person who has become a lunatic is incompetent while his intellect is deranged; although he may be examined as a witness during his lucid intervals, if it be satisfactorily shown that he has sufficient reason to comprehend the nature of the obligation, and feels the restraints which the obligation imposes. Where it is once shown, or established, that the insanity or lunacy of the witness existed, the presumption of its continuance arises until rebutted by proof,[1] the burthen of which devolves upon the party alleging a restoration, or a lucid interval.[2]

[1] In all cases where the act of a party is sought to be avoided on the ground of his mental imbecility, the proof of the fact lies upon him who alleges it, and until the contrary appears, sanity is to be presumed. This rule of law is recognized by all elementary writers on the subject; and in all adjudged cases which I have met with, in both law and equity, the court, in their reasoning and opinions, seem to take it for granted.

[2] This rule undoubtedly has its qualifications, one of which is, that after a general derangement has been shown, it is then incumbent on the other side to show that the party who did the act was sane at the very time when it was performed. But independently of authority the law ought to be so. Almost all mankind are possessed of at least a sufficient portion of reason to be able to

Peake lays down a general proposition, "That all persons who are examined as witnesses must be fully possessed of their understanding, that is, such an understanding as enables them to retain in memory the events of which they have been witnesses, and gives them a knowledge of right and wrong; that, therefore, idiots and lunatics, under the influence of their malady, not possessing this share of understanding, are excluded." This principle necessarily excludes from testifying all who are besotted with intoxication at the time they are so offered as witnesses; for intoxication causes a temporary derangement of the mind; and it is impossible for such men to have such a memory of events, of which they may have had a knowledge, as to be able to present them fairly and faithfully to those who are to decide upon the contested facts.[1] Thus, a present and existing intoxication, to a considerable degree, so utterly disqualifies the person affected as to warrant the court or presiding officer to come to the conclusion that the witness is unable to state the facts and events in such a way as to make his statement worthy of reliance. It would, we think, be profaning the sanctity of the oath to tender it to a man who has no present sense of the obligation it imposes. Indeed, it would be a scandal and disgrace to the administration of justice, to allow, for a moment, the rights of individuals to be prejudiced by the testimony of any man laboring under the sin of drunkenness.

Every court or officer exercising judicial powers must necessarily have the authority to decide upon its own view of the situation of the witness offered, whether he be intoxicated to such a degree as that he ought not to be heard. Nor can this

manage the ordinary concerns of life. To say, therefore, that sanity is not to be presumed until the contrary is proved, is to say that insanity or fatuity is the natural state of the human mind. *Jackson* v. *Van Dusen*, 5 John. 159.

[1] I am not prepared to believe that the mind can so soon resume a healthy vigor after so much, and so long, derangement from such besotted habits. When the mind is thus broken down by a long course of dissipation, the feverish moments of a half sober, or even a sober, interval can not be called, therefore, a lucid interval, for the purpose of establishing the acts of the party. To lay down such a rule would be but to invite the covetous and crafty to seize the victim in an interval of his greatest physical agony and prostration, as the one in which the mind alone is clear, free, and judicious. All observation contradicts the inference of so instantaneous a mental recovery. *Menkins* v. *Lightner*, 18 Ills. 285.

lead to any improper consequences.[1] A witness is not, however, incompetent merely because he has been judicially declared an habitual drunkard, and his estate committed to a trustee, provided he is sober at the time he is offered as a witness.[2]

There is no precise age fixed at which children are admitted to give evidence. The competency of children is not regulated by their age, but by the degree of understanding which they appear to possess. In Braziere case, on an indictment for assaulting an infant five years old with the intent to outrage her, all the judges agreed that children of any age might be examined upon oath if capable of distinguishing between good and evil, and possessing sufficient knowledge of the consequences of a false oath. This is now the established rule, as well in criminal as civil cases, and it applies equally to capital offenses as to offenses of an inferior nature. "According to this rule," says Mr. Phillips,[3] "the admissibility of children depends not merely upon their possessing a competent degree of understanding, but also, in part, upon their having received such a degree of religious instruction as not to be ignorant of the nature of an oath, and the consequences of falsehood."

In illustration of this principle the court held,[4] where a child eight years old, being offered as a witness, and it appearing, that to within six weeks of the trial, she had never heard of a God, or a future state of rewards and punishments, that she had never prayed, or knew the nature of an obligation, but that since, a clergyman had twice visited and instructed her on the nature of an oath, that she was not competent; and Patterson, J., before whom the case was tried, rejected her testimony, saying: "I must be satisfied that she felt the binding obligation of an oath, from the general course of her religious education; that the effect of an oath upon the conscience of a child should arise from religious feelings of a permanent nature, and not merely from instructions, confined to the nature of the oath, recently communicated for the purpose of the trial."

The preliminary inquiries, usually made for the ascertainment of the competency of a child, are not of the most satisfactory

[1] *Hartford* v. *Palmer*, 16 John. 142.
[2] *Gebhardt* v. *Shindle*, 15 Serg. and Rawle, 235.
[3] 1 Phillips's Ev. 5. [4] *Rex* v. *Williams*, 7 Carr and Payne, 320.

nature; and are often of such a description, that merely by a slight practicing of the memory a child might be made to appear competent as a witness. The inquiry is not necessarily restricted to the ascertainment of the fact whether the child has a conception of divine punishment, as being a consequence of falsehood, but it may be of a more general character, showing the nature and extent of the child's knowledge; and as to whether such knowledge arises from merely practicing the memory, or from feelings of a permanent nature, founded upon religious instruction and moral accountability to God. It follows as the necessary result of what we have previously said, that where a child is unfit to be sworn, any account of the transaction it may have given to other persons ought not to be received in evidence.

Incompetency from defect of religious principles, the second ground of exclusion, received the sanction of some of our earliest law writers; and it appears to be of almost universal application. No exemption from this obligation can be claimed in this country, at least in consequence of rank or station. Where there is a want of a sense of moral accountability to God, the law presumes that the witness would be as likely to testify falsely as to depose to the truth.[1] While in Church investigations no form of obligation, or ceremony, is administered to the witness, yet the same tests of competency may be employed; hence the witness may be asked, before making his statement in chief, whether

[1] By the law of England, which has been adopted in this State, it is fully and clearly settled, that infidels who do not believe in a God, or, if they do, do not think that he will either reward or punish them in the world to come, can not be witnesses in any case, or under any circumstances; because an oath can not possibly be any tie or obligation upon them. Mohammedans may be sworn on the Koran; Jews on the Pentateuch; and Gentoos and others according to the ceremonies of their religion, whatever may be the form. 18 John. 103.

Mr. Justice Story held, that a person who did not believe in the existence of a God, or a future state of existence, was not a competent witness. Such, undoubtedly, is the law of England. "Our law," says an English writer on evidence, of great authority, "like that of most other civilized countries, requires a witness to believe that there is a God, and a future state of rewards and punishments." "It may now be considered as an established rule," says the same writer, "that infidels of any other country, who believe in a God, the avenger of falsehood, ought to be received here as witnesses; but infidels, who believe not that there is a God, or a future state of rewards and punishments, can not be admitted in any case. 15 Mass. 184.

he believes in God, and recognizes his divine right to impose punishment as a consequence of the binding efficacy of the obligation, which is implied in being a witness; for if he does not, his testimony should be rejected. The subject of rejection, founded on a want of religious belief, came before the Supreme Court of the State of New York. It was proved that the person offered as a witness had, within three months before the trial, often deliberately and publicly declared his disbelief in the existence of a God, and of a future state of rewards and punishments; and the Court held, "That all who did not believe in a God, or, if they did, did not think that he would either reward or punish them in the world to come, are incompetent witnesses in any case or under any circumstances; because an oath would not be any tie upon them."[1] In a subsequent case the true test of a witness's competency, on the ground of his religious principle, is said to be "whether he believes in the existence of a God who will punish him if he swears falsely."[2]

[1] *Jackson ex. dem.* v. *Gridley*, 18 John. 103.

[2] Walworth, Circuit Judge, delivered the opinion of the Court: "It is a legal presumption, that every person born and educated in a Christian country, and who has arrived at years of discretion, is a competent witness until the contrary is shown. It is, therefore, incumbent upon the party objecting to such a witness to show, by clear and satisfactory proof, that he is incompetent. Without such proof, it will not be presumed that such a witness disbelieves in the existence of a God, or in that attribute of divine justice which will, sooner or later, insure the punishment of the guilty. I apprehend the true test of the competency of a witness to be this: Has the obligation of an oath any binding tie upon his conscience? Or, in other words, does the witness believe in the existence of a God who will punish his perjury? If he swears falsely, does he believe he will be punished by an overruling Providence, either in this world, or the world to come? If he does not believe in the existence of a God, or if he believes in no punishment, except by human laws, no obligation or tie can have any binding force upon his conscience. But if he believes he will be punished by his God, even in this world, if he swears falsely, there is a binding tie upon the conscience of the witness; and he must be sworn; and the strength or weakness of that tie is only proper to be taken into consideration in deciding upon the degree of credit to be given to his testimony. It is a question as to his credibility, and not as to his competency.

"We are aware, that in the case of Gridley, the late Chief-Justice Spencer lays down the law as clearly settled, that the witness must believe in a state of rewards and punishments in the world to come, or he is incompetent. If the question had been directly before the Court in that case, I should consider this Court bound by the opinion of the Chief-Justice, as being the decision of a

Within this rule are comprehended those who believe that there shall be a future punishment, but do not believe that it is

higher tribunal on this precise question. But in that case, the witness had declared his total disbelief in the existence of a Supreme Being. He believed in no punishment by an overruling Providence in this life; and he believed that at death he would perish with the brutes. There could be no tie upon the conscience of such a witness; for he had no conscience. He considered himself, and was in fact, no better than a beast. That part of the opinion of Chief-Justice Spencer which relates to punishments in another world, was therefore an *obiter dictum*, and wholly unnecessary to the decision of the cause then before the Court.

"We should, notwithstanding, pay great deference to this opinion, as coming from the pen of such an able jurist, was I not certain he had fallen into the same error with many of the English writers, in relation to this question. The foundation of all the error on this subject, both in this country and England, was the misreporting of the opinion of Chief-Justice Willes as delivered in the case of *Omichund* v. *Barker*, in February, 1745. This case was first reported by Atkyns, in 1765. In that report Chief-Justice Willes is made to say, 'I am clearly of the opinion that if they do not believe in a God, or future rewards and punishments, they ought not to be admitted as witnesses.' And this expression, as reported by Atkyns, is referred to by most of the English writers in relation to this question. But Willes did not in reality say any such thing; but, on the contrary, he expressly declared that, in his opinion, an infidel, who believes a God, and that he will reward and punish in this world, but disbelieves a future state, may be a witness. His opinion in *Omichund* v. *Barker* was drawn out at length by himself, and was left among his other manuscript decisions; but it was not published till 1799, more than fifty years after it was delivered, when Willes's Reports were collected from the manuscripts of that learned judge, by Mr. Charles Durnford.

"In the opinion written by himself, and correctly reported by Durnford in Willes's Reports, he says, 'I am clearly of the opinion that such infidels (if any such there be), who either do not believe a God, or, if they do, do not think that he will either reward or punish them in this world or in the next, can not be witnesses in any case or under any circumstances; for this plain reason, because an oath can not possibly be any tie or obligation upon them.' It is somewhat remarkable that the rule of exclusion, as laid down by Chief-Justice Spencer, in Gridleys's case, is in the very language of Willes, except the leaving out of the words 'in this world or in the next,' and substituting therefor 'in the world to come.' To show that if there is any tie upon the conscience of the witness, his infidelity goes to his credit, and not to his competency, in another part of his opinion, Chief-Justice Willes says: 'Suppose an infidel, who believes a God, and that he will reward or punish him in this world, but does not believe a future state, be examined on oath, *as I think he may*, and on the other side to contradict him, a Christian is examined, who believes a future state, and that he shall be punished *in the next world as well as in this*, if he does not swear to the truth, I think the same credit ought not to be given to the infidel as to the Christian, because he is plainly not under so strong an obligation.'

to be eternal.[1] In an anonymous case, however, which was decided before Williams, Circuit Judge,[2] it was held that all persons who believed in the existence of a God, and in future punishment by him in this world or in the world to come, are competent witnesses. This latter doctrine is held by the Supreme Court of Massachusetts.[3] In Connecticut and Tennessee a person who does not believe in the obligation of an oath or any accountability after death, is inadmissible as a witness.[4] It was held in Ohio that a person who does not believe in future rewards and punishments, but that our deeds will be punished in this world, and that we shall exist immortal in a future state, exempt from punishment for deeds done in the body, is competent as a witness. Subsequently, in the same State, it was doubted whether a defect in religious belief should go to the competency or to the credibility of the witness.[5] The incompetency of a witness from defect of religious belief may be established by proof of his declarations out of Court, and when so established, the witness will not be permitted to deny or explain such declarations, or his opinions, or even to state his re-

"Such we understand to be the common law of England as it existed at the time of our revolution; and which, by the Constitution, is made the law of this State. And this is not a hasty opinion formed during the trial of this cause, but from having examined the subject heretofore. In this opinion I believe I am supported by most, if not all, of the circuit judges.

"There is nothing, in the case before the Court, to show that the creed of this witness is materially variant from that of a considerable class of the Universalists, who believe in the existence of a God, in the authenticity of the Scriptures, and in the divinity of the Savior, but deny that there is any punishment for the wicked after this life. Until the contrary is shown, we are bound to presume he believes in the existence of a God, who will punish the wicked in this life. In the view I have taken of the subject, this would render him a competent witness; and, as I have before observed, if his creed is any worse than this, it is incumbent on the defendant to show that fact. And however much I may regret the existence of a creed which may jeopardize the future happiness of its possessor, the rules of law and rights of conscience must not be infringed. The witness must, therefore, be sworn, and the jury are the proper judges of his credibility." Note in the case of *Butts* v. *Swartwood*, 2 Cowen, 433.

[1] *Butts* v. *Swartwood*, 2 Cowen, 431; *People* v. *Matteson*, 2 Cowen, 432.

[2] 2 Cowen, 572.

[3] *Hunscom* v. *Hunscom*, 15 Mass. 184.

[4] *Curtis* v. *Strong*, 4 Day, 51; *State* v. *Dougherty*, 2 Tenn. 80; See also Swift's Ev. 48.

[5] *Easterday* v. *Kilborn*, 1 Wright, 345.

cantation of them; but he may be restored to competency, on giving satisfactory proof of a change of opinion before the trial, a sufficient length of time to repel any presumption arising from sinister motives. In a case tried before Justice Story, the defendant made out a case of defective religious belief against two witnesses, when the plaintiff's counsel suggested that they might be personally examined, the Court said that "The defendant's counsel was not bound to rely on the testimony of these persons for proof of incompetency."[1]

CHAPTER III.

INCOMPETENCY FROM CONVICTION OF CRIME.

THE conviction, by a court of competent jurisdiction, of a person of an infamous crime, followed by judgment, disqualifies such person for giving evidence; and such persons are rejected for this cause; and are said to be incompetent on account of the infamy of their character. There is a manifest distinction between infamy of character in the ordinary sense of the expression, and that of legal infamy which results from the judgment of a court of justice. A man may be stigmatized by public fame or rumor only; and in such a case it only affects the credit of his testimony, but does not go to the formal exclusion of such a person as a witness. It frequently happens, that a witness is suffered to give evidence, because not absolutely disqualified by the rules of law, though he may be far lower in point of real character than another, who is excluded as incompetent. The former may be said to be *infama juris*,—that is, infamous in the eye of the law,—the latter *infama facta;* the former destroys his competency, the latter goes to his credibility. The legal ground of exclusion, upon which this rule has been justified, is that the testimony of persons convicted of infamous crimes is destitute of all presumption of credit, and would, therefore, be more likely to mislead, than to assist, in the investigation of truth. Some regard it as part of the punishment the law imposes upon the offender; the loss is not ordinarily upon the con-

[1] *Wakefield* v. *Ross*, 5 Mason, 18.

vict, but the party who requires his evidence. The power of giving evidence ought not to be regarded as a personal privilege of the witness, but for the benefit of the public, and of suitors who may happen to be interested. Such weighty considerations have induced the courts to relax, to some extent, the rigor of the ancient common law rule; and now in some of the States such witnesses are made competent by statute, leaving their conviction to go to their credibility. And this, we think, is the better rule. It is not, however, every conviction that renders a party incompetent from giving evidence, but it has been generally laid down by writers on the law of evidence that every species of what may be termed *crimen falsi* renders the party convicted an incompetent witness.

It is clear, that by the common law a conviction for forgery, as well as of all offenses tending to prevent the public administration of justice by falsehood or fraud, such as perjury, subornation of perjury, bribing a witness to absent himself in order that he may not give evidence, conspiring to accuse another person of a capital offense, disqualifies a witness. Judgment of outlawry or felony had the same effect. The legal infamy, which disqualifies a witness, arises not from the nature of the punishment, but from the nature of the offense. The fact of the party having committed the offense can not be proved *viva voce*, nor will even an admission by the witness himself be received, except as tending to affect his credibility. It is necessary to prove, in order to exclude the witness, the judgment as well as the conviction; and this may be done in the usual way, by the record, or by an exemplified copy of the record, duly authenticated. The proceedings, when produced, must appear to be regular, and to have been rendered in a court of competent jurisdiction; thus, a paper purporting to be an indictment and conviction is imperfect as a record, without a caption or convening order; since the caption shows by what authority the indictment was found. The indictment must state all the circumstances essential to constitute the offense. Where there is enough in the record, however, to show an offense, and that the court had jurisdiction, it can not be attacked collaterally for mere errors or irregularities not amounting to a want of jurisdiction, either over the offense or the party. But where there has been a judgment of conviction, the opposite

party may show that such judgment has been reversed, vacated, or set aside. Where there has been a reversal of the judgment, the witness's incompetency is restored. The witness may also be rendered competent by a pardon from the executive of the State or general government, where the disability is created by the judgment of the court, and not by the express words of a statute; for in such a case a pardon will not restore competency; for the prerogatives of the executive are controlled by the act of the legislature. Thus, if a man be found guilty on an indictment for perjury at common law, a pardon from the crown will render him a competent witness, but if he be convicted of perjury, or subornation of perjury, under the statute of 5 Eliz. C. 9, such pardon will not render him competent. In a pardon, if the pardon is conditional, the performance of the condition ought to be shown, for on that depends its efficacy. Pardons were not unfrequently granted in England for the purpose of procuring the evidence of a witness to some offense, or supposed offense. In this way the Crown had the power of supplying or withholding evidence; and convicts, in the hope of receiving a pardon, were often tempted, and often did, exaggerate their evidence; and were, in fact, entitled to less credibility than they would have been before pardon. Human pardon may condone the offense, but it does not restore or change the character of the offender.

CHAPTER IV.

ACCOMPLICES.

NEARLY allied to the question of incompetency, is that of want of credibility; and this want of credibility may arise from several sources; but we propose in this connection to consider only one, and that is the want of credibility arising from being an accomplice. By this we mean all persons who have been connected in the commission of a crime, whether they are considered in strict legal propriety as principals, or accessories, before or after the fact. The evidence of accomplices has, at all times, been admitted, either from a principle of public policy, or from judicial necessity, or both. They are, no doubt, requisite as witnesses in particular cases; but it has been well observed,

that in a regular system of administrative justice, they are liable to serious objections. "The law," says one of the ablest and most useful writers upon modern criminal jurisprudence, "confesses its own weakness by calling in the assistance of those by whom it has been broken; it offers a premium to treachery, and destroys the last virtue which clings to the degraded transgressor. On the other hand, it tends to prevent any extensive agreement among atrocious criminals; it makes them perpetually suspicious of each other, and prevents the hopelessness of mercy from rendering them desperate."[1] The general rule is, that a person who confesses that he is guilty of a crime is a competent witness against his partner in guilt. And on the trial of an accessory for a misdemeanor, in receiving stolen goods, under the statute the principal is a competent witness. So, also, in the case of a felony, the principal is a competent witness against the accessory. The practice of admitting accomplices to give evidence against their associates in crime was adopted from analogy to the old common law of approvement, which was, when a prisoner was arraigned on a capital charge, he confessed the fact before he pleaded, and then accused his coadjutor of the same offense. He must have been indicted, and in custody, and have desired to accuse his accomplices, before he could become an approver. He must, likewise, have discovered upon oath, not only the particular offense for which he was indicted, but all treasons and felonies that he knew of; and after all this, it was in the discretion of the court to assign him a coroner, and admit him as an approver or not. If, upon the trial of the appeal, it appeared that he was a principal, and tempted the others, the court might still reject him, even after he was admitted. It must have appeared, in addition to the other facts, that what he discovered was true, and that he had discovered the whole truth; and if, on the trial, the party accused was acquitted, judgment of death was passed against the approver, upon his own confession of the indictment.[2]

[1] Chitty's Cr. Law, 82–630; Cowp. 334.

[2] Cowp. 335; Leach, 118. *The People* v. *Whipple*, 9 Cowen, 708.

In the case of *Myres* v. *The People*, 26 Ills., 175, it is said by the Court "that Carpenter was an approver, and for that reason was incompetent to give evidence, and that the Court erred in admitting him as a witness. The statute has expressly provided, 'That an approver shall not give evidence,' and if this

By the common-law, approvement is said to be a species of confession, and incident to the arraignment of a prisoner indicted for treason, or felony, who confesses the fact before pleaded, and appeals, or accuses others, his accomplices in the same crime, in order to obtain his own pardon. In this case he is called an approver, or prover, or probater; and the party appealed or accused is called the appellee. Such approvement can only be in capital offenses, and is, as it were, equivalent to an indictment, since the appellee is equally called upon to answer it.[1] It was out of this doctrine of approvement that the modern practice of admitting accomplices to give evidence, under an implied promise of pardon, grew up. And Mr. Phillips, in his work on evidence,[2] says: "Great injustice would result if it were the practice of jurors to convict upon the unsupported evidence of accomplices, whose testimony, though admitted from necessity, ought always to be received with great jealousy and caution, for, upon their own confession, they stand contaminated with guilt. They admit a participation in the very crime they endeavor to fix upon the prisoner. They are sometimes entitled to a reward, and always expect to earn a pardon."

The doctrine, therefore, of a legal conviction upon the unsupported evidence of an accomplice has been greatly modified in practice, and it has long been considered, as a general rule of practice, that the testimony of a single accomplice ought to receive confirmation,[3] and that unless it be corroborated in some

objection is well taken, the judgment of the court below must be reversed. Who then is an approver? He is one who confesses himself guilty of felony, and accuses others of the same crime, to save himself from punishment. The fact that the witness confessed that he had been guilty of other felonies, although it went to his credibility, did not constitute him an approver."

[1] 4 Blackstone's Com. 267. *Gray, et al.*, v. *The People.* 26 Ills., 347.

[2] 1 Phillips's Ev. 31.

[3] It was urged at the trial, and again here, that the corroboration of an accomplice, to be effectual, must be in respect to some fact, the truth or falsehood of which goes to prove or disprove directly the offense charged upon the prisoner; and that the corroboration of an accomplice by one or more accomplices is not the confirmation the law requires. The court advised the jury that the witnesses, who were accomplices of the prisoner, were not to be believed by them, unless confirmed by other credible witnesses, in respect to the facts connecting the prisoner with the possession of the forged bills, or with the manufacture of them. Mr. Justice Alderson, in summing up the case of *Rex* v.

material part by unimpeachable evidence, the presiding judge ought to advise the jury to acquit the prisoner.[1] In a case tried before Mr. Justice Buller, the twelve judges were unanimously of the opinion that an accomplice alone is a competent witness, and that, if the jury, weighing the probability of his testimony, think him worthy of belief, a conviction supported by such testimony alone is perfectly legal.[2] In Jones's Case[3] Lord Ellenborough observed "that judges in their discretion will advise a jury not to believe an accomplice, unless he is confirmed, or only in so far as he is confirmed; but if he is believed, his testimony is unquestionably sufficient to establish the fact deposed to." But if the judge exercises this discretionary power to advise, he ought to remember to tell the jury at the same time that his testimony is not to

Wilkes and Edwards (7 Carr and Payne, 272) observed "that the confirmation he always advised juries to require, was a confirmation of the accomplice in some fact which went to fix the guilt on the particular person charged." See also 6 Carr and Payne, 388, 595. Every part of the testimony need not be confirmed; and the question usually is, whether the jury will believe the witness in such parts of his narrative as the confirmation does not extend to. 2 Russ. 600, and the cases there cited. It appears to us that the instructions given on this point were as favorable to the prisoner as the most liberal cases on the subject recommend; certainly more so than can be exacted of the Court by the settled rules of evidence. 2 Camp. 133, and the cases before referred to. Within these rules the jury might have been advised that if they believed the accomplices, they were bound to convict; though I concede, in the exercise of a sound discretion the Court should usually recommend the propriety of confirmatory evidence, and a discreet jury will generally require it. Here the facts which the Court advised should be confirmed by other credible witnesses before a conviction could be justified tended directly to fix upon the prisoner the offense. He is in possession of the forged bills of the bank, or the actual forging of them (the fact to be confirmed as charged) if not of the essence went to the point of the offense, and, if believed, pressed very strongly against him, and laid a foundation for giving credit to the narrative of his associates. *The People* v. *Davis*, 21 Wend. 313.

[1] Judge Dillon instructed the jury in the M'Kee whisky revenue case, "that the testimony of conspirators is always to be received with extreme caution; and weighed and scrutinized with great care by the jury, who should not convict upon it unsupported, unless it produce in their minds the fullest and most positive conviction of its truth; it is just and proper in such cases for the jury to seek for corroborating facts in material respects. It is not absolutely necessary to establish a conspiracy, or a person's connection therewith; it is competent to do so, not only by direct testimony, but by facts and circumstances which produce a clear and positive conviction.

[2] Atwood's Case, 1 Leach, 464.

[3] 2 Camp. 132.

be confirmed in every particular, but only as to some one fact or facts, the truth or falsity of which goes to prove or disprove the offense charged against the prisoner.[1] Whether the evidence produced to confirm the accomplice is satisfactory or not, is a question which the jury is to determine.[2] Lord Hale remarked in Loungies case[3] that, "in the earlier State trials, the protection and countenance afforded by judges to accomplices, spies, and informers, were carried to a shameful length." The language of Lord Holt, in the trials of the assassination plot, may probably be thought, at the present day, too favorable towards accomplices.[4] The exordium of Lord Howard toward this class of evidence, in the Algernon Sydney case, is a curious specimen of the hypocrisy of an accomplice. This probably led to that caution which induced many judges to advise an acquittal where the testimony of an accomplice is unsupported by corroborating evidence or circumstance. The rule, however, that judges should advise an acquittal where the testimony of an accomplice is unsupported trenches upon another well-established rule, that it is the peculiar province of the jury or the committee to determine the degree of credit to be attached to any competent evidence submitted for their consideration. It has accordingly been laid down in many well-considered cases as a settled rule, that a conviction obtained on the unsupported testimony of an accomplice is strictly legal.[5]

CHAPTER V.

HUSBAND AND WIFE.

We have previously said that there are three grounds of exclusion of a witness for incompetency; to some extent this relation may be regarded as constituting the fourth. The exclusion of the husband or wife, when offered as a witness for or against each other, is not universal.

By the common law, the objection was placed upon two

[1] *Gray et al.* v. *The People*, Addis. Case, 6 Carr and Payne, 388.
[2] 1 Phillips's, Ev. 39, 9 Ed.
[3] 1 Hale, C. P. 304.
[4] 12 Howard St. Trials, 1454.
[5] 7 Carr and Payne, 152; *Noland* v. *The State*, 19 Ohio, 134.

grounds: First, identity of interest; the husband and wife being regarded as one person in law. The second ground of incompetency was based upon public policy; and is now the only ground of exclusion, the other having been swept away, almost entirely, by modern legislation.[1]

The law, having regard to the happiness of the marriage state, and to prevent invasion of that confidence that husband and wife are required to repose in each other, has wisely provided, that communications made by one to the other should be

[1] The Code provides that a party to an action may be examined as a witness in his own behalf, or in behalf of any other party, in the same manner, and subject to the same rules of examination, as any other witness, except that neither husband nor wife shall be required to disclose any communication made by one to the other. The letter of the statutes certainly extends to married persons when they are parties not having conflicting interests, and the exception is a plain indication of the legislative intention to change or modify the common law rule as to the admissibility of husband and wife as witnesses. The reason of the latter rule, for not admitting husband and wife as witnesses for each other, was because of an identity of interest; nor against each other because contrary to the legal policy of marriage.

"Husband and wife," says Blackstone, "are not allowed to be evidence for or against each other, partly because it is impossible that their testimony should be indifferent, but principally because of the union of persons, and, therefore, if they were admitted to be witnesses for each other, they would contradict our maxim of law: No one shall be a witness in his own cause; and if against each other, they would contradict another maxim: No one is obliged to convict himself." (1 Bl. Com. 443).

"If they" (husband and wife), says Baron Gilbert, in his work on evidence (page 552); "swear for each other, they are not believed, because their interests are absolutely the same, and, therefore, they can give no more credit when they attest for each other than when a man attests for himself; and it would be very hard if a wife should be allowed as evidence against her husband, when she can not attest for him. Such a law would occasion implacable quarrels and divisions, and destroy the very legal policy of marriage." But of late years, in this State, material and radical changes have been made in the law of husband and wife, and in the law of evidence, and the competency and admissibility of witnesses, undermining, in a great degree, the uses of, and practically abrogating the common-law rule. The wife has been admitted to separate rights of property, and to separate rights of action, even as against the husband himself. Interest, in the event of the action, is no longer a ground for excluding a witness; and the parties themselves may be witnesses in their own behalf, or witnesses in their own cause. Parties, with certain exceptions, are placed upon the same footing and subject to the same rules of examination as any other witnesses. There is no longer any reason for excluding husband and wife as witnesses for or against each other, on the ground of interest, for as parties to an action,

kept inviolate; and that nothing confided by the one should be extracted from the bosom of the other. The law does not deem communications made between husband and wife privileged only so long as the relation exists, but it extends its application after the parties are separated, either by death or divorce; though the one may testify to facts which come to his or her knowledge, by means equally accessible to any person not standing in that relation.[1]

they may be witnesses for themselves, and it was this ground of union of interest and privilege, between husband and wife, that mainly gave rise to the common-law rule excluding them from testifying for or against each other. Be this, however, as it may, the tendency and effect of legislation has been to abrogate the common-law distinctions, growing out of the marital relation in respect to the competency of witnesses; whether husband and wife are parties to or interested in an action, they may be examined in the same manner and subject to the same rules of examination as any other witness, except that they shall not be required to disclose any confidential communication made to each other during marriage. If husband and wife are parties to an action, the statute in terms makes them competent witnesses in their own behalf, or in behalf of any other party, and subjects them to the same rules of examination as other witnesses, except protecting either from a disclosure of communications made by one to the other. The exception is strongly indicative of the legislative intention to render husband and wife, when parties, competent to testify as to all matters, other than communication made by the husband to the wife, or the wife to the husband. *Wehrkamp* v. *Willett*, 1 Keyes, 253.

[1] *Stein* v. *Bowman*, 13 Curtis's Decisions, 131, 132. In that case it was said by the Court, "That the law does not seem to be entirely settled how far, in a collateral case, a wife may be examined on matters in which her husband may be eventually interested. Nor whether, in such a case, she may not be asked questions as to facts that may, in some measure, tend to criminate her husband, but which afford no foundation for a prosecution. The decisions which have been made on these points seem to have been influenced by the circumstances of each case, and they are somewhat contradictory. It is, however, admitted in all the cases, that the wife is not competent, except in cases of violence upon her person, directly to criminate her husband, or to disclose that which she has learned from him in their confidential intercourse. Some color is found in some of the elementary works for the suggestion that this rule, being founded on the confidential relations of the parties, will protect either from the necessity of a disclosure; but will not prohibit either from voluntarily making any disclosure of matters received in confidence, and the wife and the husband have been reviewed, in this respect, as having a right to protection from a disclosure, on the the same principle as any attorney is protected from a disclosure of the facts communicated to him by his client. The rule which protects an attorney, in such case, is founded on public policy, and is essential to the administration of justice. But this is the privilege of the client, and not of the attorney. The rule which

For the purpose of promoting a perfect union of interest, and securing mutual confidence between husband and wife, the courts have generally refused to admit the wife as a witness against the husband, even after the marriage contract is at an end. When the wife is called to speak of any matter which happened during the continuance of the marriage, and which might affect the husband in his pecuniary interest, or in his character, her evidence will be rejected.[1]

protects the domestic relations from exposure rests upon considerations connected with the peace of the family. And it is conceived that this principle does not merely afford protection to the husband and wife, which they are at liberty to invoke, or not, at their discretion, when the question is propounded, but it renders them incompetent to disclose facts in evidence, in violation of the rule. And it is well that the principle does not rest on the discretion of the parties. If it did, in most instances it would afford no substantial protection to persons uninstructed in their rights, and thrown off their guard, and embarrassed by searching interrogatories.

"In the present case, the witness was called to discredit her husband; to prove, in fact, that he had committed perjury, and the establishment of the fact depended on his own confessions — confessions which, if ever made, were made under all the confidence that subsists between husband and wife. It is true, the husband was dead, but this does not weaken the principle. Indeed, it would seem rather to increase than lessen the force of the rule. Can the wife, under such circumstances, either voluntarily be permitted, or by force of authority be compelled, to state facts in evidence which render infamous the character of her husband? We think most clearly that she can not be. Public policy and established principles forbid it.

"This rule is founded upon the deepest and soundest principles of our nature— principles which have grown out of those domestic relations that constitute the basis of civil society, and which are assential to the enjoyment of that confidence which should subsist between those who are connected by the nearest and dearest relations of life. To break down or impair the great principles which protect the sanctities of husband and wife would be to destroy the best solace of human existence. We think that the Court erred in overruling the objections to this witness." *Aveson* v. *Kinnaird*, 6 East, 192. *Coffin* v. *Jones* 13 Pick. 444. 2 Starkie's Ev., 706. Peake's Ev., 5 ed,, 171.

[1] Lord Alvanley said, "To prove any fact arising after the divorce, this lady is a competent witness; but not to prove a contract, or any thing else, which happened during coverture. She was at that time bound to secrecy. What she did might be in consequence of the trust and confidence reposed in her by her husband; and miserable indeed would the condition of a husband be, if, when a woman is divorced from him, perhaps for her own misconduct, all the occurrences of his life intrusted to her, while the most perfect and unbounded confidence existed between them, should be divulged in a court of justice." He added: "It never shall be endured that the confidence which the law has created

A wife should not be called, in any case, to give evidence tending to criminate her husband. Mr. Justice Gross[1] observed: "In all the books which treat of evidence there are certain technical rules laid down, which are highly beneficial to the public, and ought not to be departed from. Some of these relate to husband and wife, and we find the general rule as to them to be founded, not on the ground of interest, but of policy, by which it is established that a wife shall not be called to give evidence in any degree to criminate her husband;" and Lord Holt says "that she shall not be called indirectly to criminate him, and the rule seems to have governed all the decisions from that time to the present." An apparent exception was at one time allowed on grounds of State policy, the courts holding that the wife was a competent witness against the husband in case of treason;[2] but it has since been settled that the wife is not bound to discover the treason of her husband.[3] In one case it was held that a wife, who had been divorced *a vinculo matrimonii*, was a competent witness to prove a forgery committed by the husband during coverture; but that case was not in harmony with the adjudged cases, and was subsequently expressly overruled.

In bastardy cases, where the mother is a married woman, it has been uniformly held that the wife was not a competent witness to prove the non-access of the husband; but from the necessity of the case, she has been constantly admitted to prove the criminal intercourse by which the child was begotten.[4]

while the parties remained in the most intimate of all relations, shall be broken, whenever, by the misconduct of one party, that relation has been dissolved." *Ratcliffe* v. *Wales*. 1 Hill, 64.

[1] *The King* v. *Chiviger*, 2 Term, 268.

[2] Bull, N. P., 289. [3] 1 Brownl. 47.

[4] From these authorities I think this conclusion may be drawn, that circumstances which show a natural impossibility that the husband could be the father of the child of which the wife is delivered, whether arising from his being under age of puberty, or from his laboring under disability occasioned by natural infirmity, or from the length of time elapsed since his death, are grounds on which the illegitimacy of the child may be founded. And, therefore, if we may resort to all such impediments, arising from the natural causes adverted to, we may adopt other causes equally potent and conducive to show the absolute physical impossibility of the husband's being the father. I will not say, the improbability of his being such, for upon the ground of improbability, however strong, I should not venture to proceed. No person, however, can raise a question, whether a fortnight's

The rule, as we have seen, which excludes parties from being witnesses for themselves applies to the case of husband and wife, neither of them being admissible as a witness in a case civil or criminal, and where by law the other would be incompetent. An exception or qualification of this rule is admitted in a case where the husband's account books were kept by the wife, and were offered in evidence in an action brought by the husband for goods sold, the wife was held a competent witness to testify that she made the entries by his direction.

The principle of exclusion renders the wife an incompetent witness against a co-defendant, tried with her husband, if the testimony concerns her husband, though it be not directly against him; nor is she a competent witness for a co-defendant, if her testimony would tend directly to the acquittal of her husband. Where, however, the grounds of defense are several and distinct, and in no manner dependent on each other, her testimony may be admitted for the other. Where an offense was jointly committed by two or more, and they were jointly indicted, but tried separately, it was held that the wife was a competent witness for the other.[1] Where the wife of one prisoner was called

access of the husband before the birth of a full-grown child can constitute, in the course of nature, the actual relation of father and child. But it is said that if we break through the rule insisted upon, that the non-access of the husband must continue the whole period between the possible conception and delivery, we shall be driven to nice questions. That, however, is not so; for the general presumption will prevail, except a case of plain natural impossibility is shown; and to establish, as an exception, a case of such extreme impossibility, as the present, can not do any harm or produce any uncertainty in the law on this subject. Without weakening, therefore, any legal presumption applicable to the subject, we may, without hesitation, say that a child born under these circumstances is a bastard. With respect to the case where the parents have married so recently before the birth of the child that it could not have been begotten in wedlock, it stands upon its own peculiar grounds. The marriage of the parties is the criterion adopted by law, in cases of ante-nuptial generation, for ascertaining the actual parentage of the child. For this purpose it will not examine when gestation began, looking only to the recognition of it by the husband in the subsequent act of marriage. *The King* v. *Luffe*, 8 East, 207.

The King v. *The Inhabitants of Kea*, 11 East, 132. (*Canton* v. *Bentley*, 11 Mass., 441.) It may well be doubted, however, whether a husband can be a competent witness to prove a fact which amounts to adultery on the part of the wife, and it would certainly be against good manners and common decency that such evidences should be admitted.

[1] *Fullen* v. *The People*, 1 Doug. Mich. R. 48.

o prove an *alibi* in favor of another jointly indicted and tried, she was held incompetent, and her evidence was excluded on the ground that her testimony tended to weaken that of the witnesses against her husband, by showing that they were mistaken n a material fact.[1]

It makes no difference in the principle of exclusion at what ime the relation of husband and wife commenced, the principle being applicable to its fullest extent whenever either of them is directly concerned, and the relation of husband and wife forms n exception to the general rule that neither a witness nor the opposite party can, by his own act, deprive the other party of a ight to the testimony of the witness.

Thus, where the defendant married the witness after she was ummoned to testify she was held incompetent. The rule of exclusion is the same between the admissibility of the husband and hat of the wife, where the other is a party, and when in any ase they are admissible against each other. They are, also, or a like reason admissible for each other.[2] The fact that the elation no longer exists is immaterial, the object of the rule being to secure domestic happiness by placing the confidential ommunications between husband and wife under the protecting anction of the law,[3] and, therefore, whatever has come to the nowledge of either husband or wife, by means of the confi-

[1] *Rex* v. *Smith*, 1 Modd. Cr. Cases. 289.

[2] The original objects, that were to be effected by allowing the wife to be a witness against her husband, in cases of personal violence upon her, do not seem to require the extension of the exception, so far as to allow her to be a witness for her husband on the trial of an indictment against him for an assault upon her, where the government have other testimony to sustain the charge; and, as a new question, we should have some doubts as to the correctness of the doctrine contended for by the defendant. But the elementary books on criminal law all seem to recognize and adopt the rule that in all cases where the wife may be called as a witness against her husband, she may also be used as a witness in his favor. This proposition was stated in the case of *Rex* v. *Sergeant* Ry. and Mood. 352, as one that had been held in the case of *King* v. *Perry*, not elsewhere reported. Abbott, C. J., in stating that case, states his concurrence therein, and that there is no distinction between admitting the wife to testify for or against her husband, and that if competent in the case for one purpose she is equally so for the other. *Commonwealth* v. *Stephen Murphy*, Allen, 491, 492.

[3] In any action brought by a wife after the death of her husband against a railroad corporation for injuries occasioned to her by their locomotive engine

dence of the marriage relation, can not afterwards be used as testimony, even though the other party be no longer living. This principle of exclusion is so fully recognized, that in a case where the husband was offered as a witness against the wife, charged with conspiracy in procuring him to marry her, he was held incompetent.[1] Lord Alvanley once said, "It shall never be endured that the confidence which the law has created, while the parties remain in the most sacred of all relations, shall be broken whenever, by the misconduct of one of the parties, the relation has been dissolved."

This rule of exclusion extends only to lawful marriage, or, at least, such marriages as are innocent in contemplation of law. Thus, upon the trial of a party for bigamy, a woman with whom the second marriage was had was held to be a competent witness for the reason that the second marriage was void. But if the proof of the first marriage was doubtful, and the fact of the second marriage was in controversy, the same principle would exclude the second wife also. But where the first wife's testimony is inadmissible, she may still be produced in Court for the purpose of being identified; and this, although the proof thus furnished may fix a criminal charge upon her husband. There are two modes of proving a marriage so as to exclude the husband or wife from being witnesses for or against each other; one is by proof of actual marriage, and the other is by general reputation and by cohabitation or by proof of the admission of the defendant. There is still another mode, which is sometimes resorted to; that is, by an examination of the witness on his or her *voir dire*. For though, if the marriage is established, the witness is incompetent, subject to the qualification that a married woman is a competent witness against her husband to prove personal violence, used by the husband against the wife, or to prove that the defendant forcibly abducted and married her, provided the force was continued up to the marriage; so she is a competent wit-

while traveling in the highway with her husband, and in a vehicle driven by her, his declarations made in her absence, as to the cause and circumstances of the accident, and his previous knowledge of the disposition of the horse, and his statements, showing that knowledge, are inadmissible in evidence for defendants. *Sarah E. Shaw* v. *Boston and Worcester Railroad Corporation*, 8 Gray, 45.

[1] *Rex* v. *Sergeant*, 1 Ky. and M. 352.

ness against her husband on an indictment for a rape, or for a conspiracy to commit a rape upon her own person. And it may now be regarded as settled that the wife is a competent witness in all cases of alleged personal injury; yet the practice is, where the husband and wife are incompetent, to receive their evidence notwithstanding their incompetency, when the party whose privilege it is to object elects to do so.

If the parties, as we have previously stated, were not lawfully married they are competent as witnesses for and against each other; but that statement should be received with this qualification, that where the acknowledged relation by the parties of husband and wife exists, it is not competent for another person to introduce evidence tending to establish the illegality, the parties themselves recognizing and believing the relation to be lawful.

Before leaving this question, we will call attention to the fact that where the husband and wife are indicted for a joint offense, their declarations are received for and against each other, to the same extent, and to the same extent only, that the declarations of other joint parties would be received, without reference to this peculiar relationship.[1] The declarations of either husband or wife are, however, receivable in evidence for or against each other when they constitute a part of the *res gestæ*, which are material to be proved; as where the husband obtained an insurance on the wife's life as a person in health, she being in fact diseased,[2] or in an action by the husband against a third person for beating his wife (what she said, at the time she was beaten, is admissible in evidence as part of the *res gestæ*),[3] or for enticing her away,[4] or in an action against the husband for the board of his wife for having turned her out of doors.[5] The declarations of the wife are also admissible when made by her after marriage against the husband, in favor of a creditor, in respect to a debt previously due in an action against the husband and wife for the recovery of the debt.[6]

[1] *Commonwealth* v. *Robbins*, 3 Pick. 63; *Commonwealth* v. *Briggs*, 5 Pick. 429; *Evans* v. *Smith*, 5 Monroe, 363–4; *Turner* v. *Coe*, 5 Conn, 93.

[2] *Averson* v. *Lora Kinaird*, 6 East, 188.

[3] *Thompson* v. *Freeman*, Skin. 402. [4] *Gilchrist* v. *Bayless*, 8 Watts, 355.

[5] *Walton* v. *Greene*, 1 C. and P. 621. [6] *Brown* v. *Caselle*, 6 Blackf. 147.

CHAPTER VI.

THE EXCLUSION OF EVIDENCE BASED UPON PUBLIC POLICY.

It will be observed that this ground of exclusion is not founded upon the incompetency of the witness, but upon the inadmissibility of the evidence, although the witness may be competent. The principle of the rule of law which excludes certain evidence is based upon grounds of public policy, because greater mischief would probably result from legalizing its admission than from wholly rejecting it. This principle of exclusion, as we have previously seen, applies to the confidential communications between husband and wife. It also applies to professional communications, secrets, and awards of state, confidential communications between counselors, solicitors, or attorneys of the party and the client; clerks of counselors, solicitors, or attorneys; clergymen and medical persons, to a certain extent.[1]

[1] The confessions of a party, voluntarily made, to members of the same Church, may be given in evidence on his trial for the crime or misdemeanor so confessed by him. *Commonwealth* v. *Alpheus Drake*, 15 Mass. 161. Confessions made to a clergyman or priest for the sake of easing the culprit's conscience may be given in evidence. Peake Ev. 253, Am. from 5th Lond. Ed. In the case of *Rex* v. *Gillam*, very lately reserved for the opinion of the twelve judges, and argued before them in Easter term, 1828, the prisoner had been tried and convicted for murder, principally upon the evidence of his own confessions to the jailor and the mayor. These confessions the prisoner had been induced to make by the previous exertion of religious persuasions on the part of the chaplain of the jail and under the influence of his representations of the Christian necessity and benefit of confessing. The judges were of opinion that the confessions had been properly received, and that the conviction was right, principally upon the ground it is understood that there were no temporal hopes of benefit or forgiveness held out, and that such hopes, if referable merely to a future state of existence, are not within the principle on which the rule for excluding confessions obtained by improper influence is founded. 2 Russ. on Cr. 648, 2d Lond. Ed. *Sed vide* Smith's Case, New York City Hall Recorder, Vol. ii, page 77. As to confessions generally, see 2 Russell, 644, Archb. Pl. and Ev. Crim. Cases 108, 4th Lond. Ed. *Commonwealth* v. *Knapp*, 9 Pick. 496.

By the capitularies of the French kings and some other Continental codes of the Middle Ages, the clergy were not only excused, but, in some cases, were utterly prohibited from attending as witnesses in any cause. *Clerici de judicii sui cognitione non cognatur in publicum dicere testimonium. Capit.*

The secrets of State, from motives of public policy, are not allowed to be disclosed, whether the matter concerns the administration of the government or the administration of penal law. Thus, in criminal trials, the names of the persons employed in the discovery of the crime are not permitted to be disclosed any further than is essential to a fair trial of the question of the prisoner's innocence or guilt; and in public prosecutions, no question can be put which tends to reveal the name of the secret informer of the government, even though the question be propounded to the witness in order to elicit the fact that he was himself the informer.[1] A full opportunity should be given to discuss the truth of the evidence against the prisoner; but such opportunity should not be carried to the extent of ferreting out the agencies of the government employed for the detection of crime. Hence, it appears that a witness who has been employed to collect information for the government will not be permitted to disclose the name of his employer, or the nature of the connection between them, or the name of any person in the channel of communication with the government or its officers; but the witness may be asked whether he made any communications, and if he did, whether the person to whom the information was communicated was a magistrate or not.[2]

The official transactions between the heads of the departments of the general or State governments, their officers, clerks, subordinates, and agents, are regarded in general as privileged communications. Thus, a military officer acting in subordination to his superior, or to the President of the United States, or to the Governor of a State, his communications, made in the course

Reg. *Francorum*, *lib.* 7, § 118 (A. D. 827). *Ut nulla ad testimonia dicendum ecclesiastici cujus libet pulsetur persona.* Id. § 91. See Leges Barbar. Antiq. Vol. iii, pp. 313, 316; Leges Langobardicæ in the same collection, Vol. i, pp. 84, 209, 237. But from the Constitutions of King Ethelred, which provide for the punishment of priests guilty of perjury—*si presbyter alicujus inveniatur in falso testimonio vel in perjurio*—it would seem that the English law of that day did not recognize any distinction between them and the laity in regard to the obligation to testify as witnesses. See Leges Barbar. Antiq. Vol. iv, p. 294; Ancient Laws and Inst. of England, Vol. i, p. 347, § 27; 1 Greenleaf, 344.

[1] *Rex* v. *Hardy*, 24 Howell St. Tr., 758. *Attorney-general* v. *Briant*, 15 Law Journal U. S. ex. ch. 265.

[2] 1 Phillips's Ev., 180–181. *United States* v. *Moses*, 4 Wash. 726.

of his official duty, are privileged; and this privilege extends to all correspondence between an agent of the government and either of the departments thereof. The interest of the State will not be allowed to suffer by requiring such agents or officers to make disclosures. The President of the United States and the Governors of the several States are under no obligation to disclose information, or to produce papers communicated or intrusted to them, when, in their own judgment, the disclosure or the production of such papers would be inexpedient, on public considerations. Where the law will not, from motives of public policy, compel the production of papers, because they are privileged, it will not receive nor suffer secondary evidence of their contents to be given.[1]

Communications, though made to an official person, are not regarded as privileged where they are not made in the discharge of a public official duty. A Senator of the United States, it seems to have been held, may be examined as to what took place in a secret executive session, where the Senate refused, on the parties' application, to remove the injunction of secrecy.[2] This decision, however, is irreconcilable with the preceding rule; for if the matters occurring in secret executive session in the Senate are inquirable into, then the object of the rule may, in general, be defeated. Lord Ellenborough held, that though one member of Parliament might be asked as to the fact that another member took part in debate, yet the examiner was not privileged to go further, and to inquire of the witness what had been said by such member during the debate.

The proceedings of the grand jury, upon the same principle, are regarded as privileged;[3] but this rule of exclusion must not

[1] *Yoter* v. *Saum*, 6 Watts, 156.

[2] *Law* v. *Scott*, 5 Har. and John. 436.

[3] Nothing could better illustrate the wisdom of the rule which holds the deliberations of the jury room to be inviolable; and precludes jurors from giving evidence of their own misconduct, of the reason and ground of their determinations, and the motives which govern their conduct. These are different in different jurors; some being influenced by one reason or motive, and others by different ones. If we required perfect unanimity in their reasoning, as well as in the results, agreements would become as rare as disagreements now are.

Men of strong minds and sound judgments, who are very sure to come to wise and just conclusions, would, if called upon to state the grounds of their

be stated too broadly. Bigelow, Justice, said that "the extent of the limitation upon the testimony of the grand jurors is best defined by the terms of their oath of office," by which "the commonwealth's counsel, their fellows', and their own, they are to keep secret." They can not, therefore, be permitted to state how any member of the grand jury voted, or the opinion expressed by their fellows, or themselves, upon any question before them; nor to disclose the fact that an indictment for felony has been found against any person not in custody, or under cognizance; nor to state in detail the evidence on which the indictment is founded. To this extent the free, impartial, unbiased administration requires the proceedings before the grand jury to be kept a secret. By no other means can perfect freedom of deliberation and opinion among jurors, and the ends of an energetic administration of criminal justice be securely obtained. But we are not aware that the sanction of secrecy has ever been extended beyond this. We know of no authority that carries the rule of exclusion further; and we can see no ground of policy or reason for its extension.[1] A grand juror was, therefore, held competent to prove that a certain witness was not before the grand jury at the finding of a certain indictment.[2]

This same principle, founded upon public policy, in ecclesiastical trials, or investigations, would exclude the official transactions of the heads of the Church, and their subordinate confidential agents, as well as communications pertaining to the government of the Church, in their several departments. Applying the analogy of the civil law to the proceedings of investigating committees, their actions, while engaged in preliminary

opinions, often give very insufficient and unsatisfactory reasons for their decisions. The secrecy of the deliberations, and the discussions of the jury, and the exemption of jurors from the liability of being questioned, as to their motives and grounds of action, are highly important to the freedom and independence of their decisions. *Hannum* v. *Belchertown*, 19 Pick, 313.

[1] *Commonwealth* v. *Hill*, 11 Cush. 140. *Freeman* v. *Arkell*, 1 Car. and Payne, 135–137. *Koper* v. *Catton*, 3 Watts, 56. 1 Greenl. Ev. sec. 252.

[2] Where a witness, before the grand jury, has committed perjury in his testimony, either before them, or at the trial, the reasons mentioned in the text for excluding the testimony of grand jurors does not prevent them from being called as witnesses to prove what such witness testified before the grand jury. 1 Chitty's Crim. Law, page 317. Wharton's Am. Crim. Law, 130.

investigation, ought to be privileged and not to be admitted as evidence upon the trial. To require the members of a committee to state what they said, and how they voted, would be productive of great evil and mischief, and it would often happen that our best and most substantial members of the Church would refuse to act, if their action was to be subjected to the severe criticism of a trial. Their duties, like those of a grand jury, are simply to inquire, and make investigation, where a party is accused of an offense or the violation of any disciplinary rule, and report the result of such investigation to the proper tribunals of the Church.

Confidential communications made to solicitors, attorneys, and counselors-at-law, are, by the civil law, both here and in England, protected; and such counselor, attorney, or solicitor of a party can not be compelled to disclose communications made to him, or to disclose papers, documents, or letters delivered to him while acting in that relation. Matters coming within the ordinary scope of professional employment, or papers, documents, and letters received by such solicitor, attorney, or counselor, in his professional capacity, either from a client, or on his account, in the transaction of his business in the course of their employment, and known only through their professional relation to the client, they are legally bound to withhold; and they will not be compelled to disclose the information, or produce the papers in any court, civil or ecclesiastical, as a party or as a witness. This rule is of very ancient date, coming down to us as a part of the common law; not because of any particular importance that the law attributes to the legal profession, does it throw around it a protection and exemption denied to other classes, but it is solely founded on the regard which the law manifests for public justice. Experience has proved that, in the transaction of legal business, we can not dispense with the aid of men skilled in the practice of the law; and in those matters that affect rights and prescribe remedies which form the basis of all judicial proceedings, if such exemption did not obtain, who would dare consult a legal adviser, with a view to the enforcement, or the vindication of his rights, when assailed? Chief Justice Shaw said: "By this rule it is well established that all confidential communications between attorney and client are not to be revealed at any future period of time, nor in any action or proceeding between other persons; nor

after the relation of attorney and client has ceased. This privilege is that of the client, and not of the attorney, and never ceases unless waived by the client."[1]

This privilege is not confined to the case of communications made to a counselor, solicitor, or attorney, with a view to the prosecution or defense of a suit, or legal process, pending, or immediately contemplated at the time of the communication, but it extends to all communications made to an attorney or counselor, duly qualified and authorized as such, and applied to by the party in that capacity, with a view to obtain his advice and opinion in matters of law, in relation to his legal rights, duties, and obligations, whether with a view to the prosecution or defense of a suit, or other lawful object.[2] So numerous and complex are the laws by which the rights and duties of citizens are governed; so important is it that they should be permitted to avail themselves of the superior skill and learning of those who are sanctioned by the law, as its ministers and expounders, both in ascertaining their rights in the country, and maintaining them most safely in courts, without publishing those facts which they have a right to keep secret, but which must be disclosed to a legal adviser, or advocate, to enable him to perform successfully the duties of his office, that the law has considered it the wisest policy to encourage and sanction this confidence, by requiring that on such facts the mouth of the attorney shall be forever sealed; but this privilege of exemption from testifying to facts actually known to the witness is in contravention to the general rules of law, and is not to be extended beyond the limits of that principle of policy upon which it is allowed. "It is extended," says Mr. Justice Shaw, "to no other person than an advocate or legal adviser, and those persons whose intervention is strictly necessary to enable the client and attorney to communicate with each other, either as interpreter, attorney, or clerk. This privilege is confided by counselors, attorneys, and solicitors, when applied to professionally, and when acting in that capacity."[3]

If the attorney is not applied to in his official character, the

[1] *Hatton* v. *Robinson*, 14 Pick, 421. 2 Starkie on Ev., 395. *Baker* v. *Arnold*, 1 Kane's R. 258.

[2] *Greenough* v. *Gaskell*, 1 Mylne and Keene, 98. *Foster* v. *Hall*. 12 Pick, 89.

[3] *Wilson* v. *Rastall*, 4 Tenn. R. 753.

law implies no such confidence, and the attorney or counselor then stands like other men; but if his advice is solicited in his professional character, then the rule applies. There are, however, many cases in which an attorney is employed in transacting business not properly professional, and where the same might be transacted by any other person or agent. In such case, the fact that the agent or person employed to transact the business sustains the character of an attorney, does not render the communication attending it privileged, and it may be testified to by him. Mr. Justice Buller says that "the privilege is confined to the case of a counselor, solicitor, or attorney; and it must be proved that the information was communicated to the witness in one of those characters; for if he be employed merely as a steward, or as an agent without reference to his professional character, he may be examined. So where the matter is communicated by the client to his attorney for purposes in no way connected with the object of the retainer, and the employment of the attorney, as such, he may be examined.[1] The difference is, whether the communication was made by the client to the attorney in confidence, as instructions for conducting his cause, or a mere *gratis dictum.*[2]

[1] *Cobden* v. *Hendricks*, 4 Tenn. R. 432.

[2] In respect to the next exception, the Court are of the opinion that the testimony of Mr. Robinson was rightly rejected. Mr. Robinson very properly submitted it to the Court to determine upon the facts disclosed whether he should answer or not, having no wish either to volunteer or to withhold his testimony. The rule in such case is that the privilege of confidence is the privilege of the client, and not of the attorney, and, therefore, whether the facts shall be disclosed or not, must depend upon the just application of the rule of law, and not upon the will of the witness.

Mr. Robinson states that he has no knowledge of the subject except what he derived from the communications of Nehemiah Foster, the grantor; that he was in fact an attorney at law, admitted and sworn; that he announced himself to Foster as such before the conversation commenced, and that he was consulted in that capacity, and gave his advice in that capacity. That no fee was paid is immaterial, the legal obligation to pay a *quantum meruit* being in this respect as effectual a retainer as an actual payment. Although the general rule, that matters communicated by a client to his attorney in professional confidence the attorney shall not be at any time afterwards called upon or permitted to disclose in testimony is very well established; still there is some difference of opinion as to its precise limits. Some points seem clearly settled by the cases. It is confined strictly to communications to members of the legal profession, as

So strictly is the rule held, that the privilege extends only communications made by the client to his attorney for the pu

barristers and counselors, attorneys and solicitors (*Wilson* v. *Rastall*, 4 T. 759), and those whose intervention is necessary to secure and facilitate t communication between attorney and client as interpreters (*Du Barre* v. *Livet* Peake's Rep. 78), agents (*Perkins v. Hawkshaw*, 2 Stark. Rep. 239), and att ney's clerks. *Taylor* v. *Foster*, 2 Car. and P. 195.

It seems also well established that the matter thus disclosed in profession confidence can not be disclosed at any future time; nor can it be given in e dence in another suit, although the client from whom the communication came no party and has no interest in it. *Rex* v. *Withers*, 2 Camp. 578. And it the well-known modification of the rule that the privilege of confidence is th of the client and not of the attorney; and, therefore, the latter shall not permitted to disclose it by his testimony, if ever so much inclined to do s unless released from the obligation by the client. Bul. N. P. 284, Petrie's cas cited 4 T. R. 759.

But the point alluded to about which some difference of opinion has exist is this: whether the subject matter to which the privilege of confidential co munication extends is confined to those communications which are made counsel and attorneys, in relation to the prosecution or defense of a suit at la existing or contemplated; or whether it embraces other cases when a person h occasion to avail himself of the superior knowledge and skill of a profession man in understanding his legal rights, and when, in order to obtain that info mation, he is under the necessity of stating facts which he has a right to kee in strict secrecy.

I am not aware that any of the earlier cases have turned upon this distin tion, or that the point has been directly made till recently.

In the text writers the rule is laid down in terms broad enough to inclu other occasions, when parties have need of the aid of a professional advise and one is applied to in that character, and for that purpose.

Bac. Abr. Evidence A. 3: "It seems agreed that counselors, attorneys, solicitors are not obliged to give evidence or to discover such matters as com to their knowledge in the way of their profession; for, by the duty of the offices, they are obliged to conceal their clients' secrets, and every thing they a intrusted with is *sub sigillo confessoris;* for," etc.

Phillips on Evidence (6th Ed.) 131: "Confidential communications b tween attorney and client are not to be revealed at any period of time—not i an action between third persons—not after the proceeding to which they r ferred is at an end, nor after the dismissal of the attorney. The privilege of n being examined to such points as have been communicated to the attorne while engaged in his professional capacity, is the privilege of the client, not the attorney, and it never ceases. It is not sufficient to say the cause is at a end;—the mouth of such a person is shut forever.' Buller, J., 4 T. R. 759. the party waive his privilege the witness may of course be examined."

I will briefly allude to the cases in which contrary doctrines upon this poi have been held. In *Robson* v. *Kemp*, at *nisi prius*, 4 Esp. R. 235, and 5 Es R. 52, it was ruled by Lord Ellenborough, that an attorney employed by conse

pose of obtaining legal advice, that in a late case it was held that a communication made by a client to his attorney for the purpose,

of two parties in preparing a deed from one to the other, can not be examined as to what he so become informed of in preparing the deed, in an action by the assignees of one against the other, suggesting fraud in the conveyance. *Cromack* v. *Heathcote*, 2 Brod. & B. 4; S. C. 4 Moore's R. 357. In this case it was held that communications, made by a party to an attorney, are confidential, although they do not relate to a cause existing or in progress at the time they were made; and where an attorney was applied to by a father to prepare a deed by which his property was to be assigned to his sons, and he stated there was no consideration, though the attorney refused to prepare it, and it was afterwards drawn by another, it was held that such attorney was precluded from giving evidence of that fact. C. C. P. Easter Term, 1820.

But in *Williams* v. *Mudie*, 1 Car. & P. 158, it was ruled by Abbott, C. J., at *nisi prius*, that whatever is communicated for the purpose of bringing or defending an action is privileged, but not otherwise. S. C. reported Ryan and Moody, 34, Hilary Term, 1824. See the note in Ryan and Moody, 35.

Wadsworth v. *Hamshaw*, 2 Brod. & B. 5, note; 4 Moore, 358. The same point was ruled by Abbott, C. J., at *nisi prius*, March, 1829.

Broud v. *Pitt*, 3 Car. & P. 518. "In this case it was ruled by Best, C. J., at *nisi prius*, that no communications made to an attorney are privileged but such as are made for the purpose of the attorney's commencing or defending a suit. These cases are certainly of great weight in point of authority; and, although they are decisions at *nisi prius*, would be deserving of much consideration and, if they stood alone, would seem almost decisive. But it is obvious that they are directly opposed to the *nisi prius* decisions of Lord Kenyon and to the case of *Cromack* v. *Heathcote*, which was decided by the Common Pleas upon argument. The *nisi prius* case of *Wadsworth* v. *Hamshaw* was alluded to not having then been reported, and Dallas, C. J., says: "One is staggered at first on being told that there are decided cases which seem at variance with first principles the most clearly established, etc., and I know of no such distinction as that arising from the attorney being employed or not employed in the cause. A client goes to give instruction touching a deed, and the communication must be deemed confidential as between attorney and client, though the attorney refused the employment." And Richardson, J., says: "Suppose the case of an attorney consulted on the title to an estate, where there was a defect in the title, can it be contended that he would ever be at liberty to divulge the flaw? I never heard of the rule being confined to attorneys employed in the cause."

Bramwell v. *Lucas*, 4 Dowl. & Ryl. 367, S. C. 2 Barn. & Cressw. 745: "A communication made by a client to his attorney to obtain information as to a matter of fact, and not to obtain his legal advice, is not privileged. A trader, at the suggestion of his attorney, called a meeting of the creditors, and the attorney advised him to stay at his office till he (the attorney) could ascertain whether the creditors would give him a safe conduct; and he did stay there several hours to avoid arrest. The object was to show this fact as an act of bankruptcy, and the question was whether this was a privileged communication. It

not of asking his legal advice or of consulting him upon technical points, but to obtain information as to a matter of fact, is

was decided that it was not, expressly upon the ground that the object of the question was to get information as to a matter of fact whether any arrangement had been made to protect the client, and not for obtaining the legal advice or opinion of his attorney. This certainly implies that if the communication had been made with a view to obtain legal advice as to his rights though it had no relation to prosecuting or defending a cause, it would have been privileged. And Abbott, C. J., said: "Whether the privilege extends to all confidential communications between attorney and client or not, there is no doubt that it is confined to communications to the attorney in his character of attorney. A question for legal advice may come within the description of a confidential communication, because it is part of the attorney's duty to give legal advice; but a question for information as to a matter of fact, etc., where the character or office of an attorney has not been called into action, has never been held with the protection, and is not within the principle upon which the privilege is founded."

Barkhurst v. *Lowten*, 2 Swanston, 216, before Lord Chancellor Eldon, in 1819: It was a case involving inquiries respecting the sale of an advowson charged to have been simonical, and of course subjecting the parties to penalties. The defendant had declined answering certain questions on the ground that it would implicate himself by involving him in the crime of simony. Godfrey, an attorney, was called to answer interrogatories as a witness, and objected as having been professionally concerned in the transactions which the bill characterized as an offense. From this statement I understand that he had been consulted as to the legal character of the transactions, not that he had been retained in any suit or cause pending or contemplated. The chancellor says: "Godfrey stands in a very different situation (from the party), insisting not that the disclosures would tend to criminate himself, but that it would consist of a matter of which he could obtain a knowledge only by the confidence of his employer. The privilege which he claims is the privilege not of the attorney but of the client, and is founded on this consideration that there would be no safety in dealing with mankind if persons employed in transactions were compelled to state that which they have learned only by this species of confidence. But the moment confidence ceases privilege ceases, and the attorney must answer as any other witness." And the examination was so shaped as to protect him from disclosing what he acquired a knowledge of from his professional employment, and require him to testify as to all other matters.

I consider this case as carrying with it the authority of Lord Eldon to this position, that an attorney is precluded from disclosing communications made in the course of a professional employment, and for the purpose of giving legal advice, although such employment was not immediately connected with the conduct of a legal proceeding.

But without further commenting upon the authorities I will cite a passage from the 6th edition of that excellent work, Phillips on Evidence, published in 1824. It is not to be found in the earlier editions, and probably it was not till about the time of the date of this late edition that the question had been dis-

not privileged, and may be disclosed by the attorney if called as a witness in a cause.[1]

tinctly raised and discussed. 1 Phillips 134. "This privilege of the client is not confined to those cases only where he has employed the attorney in a suit or cause, but extends to all such communications as are made by him to the attorney in his professional character and with reference to professional business. If any attorney were to be consulted on the title to an estate, he would never be allowed to disclose any information thus communicated to him to the prejudice of his client. 2 Brod. & Bingh. 6. Or if an attorney were professionally employed to make a draft of an assignment of goods, which, however, he declined to make, he would not be allowed to disclose that circumstance in case a question should arise where an assignment subsequently drawn by another attorney was fraudulent. *Cromack* v *Heathcote*, 2 Brod. & Bingh. 4.

On the whole, we are of opinion that, although this rule of privilege, having a tendency to prevent the full disclosure of the truth, ought to be construed strictly, yet still, whether we consider the principle of public policy upon which the rule is founded, or the weight of authority by which its extent and limits are fixed, the rule is not strictly confined to communications made for the purpose of enabling an attorney to conduct a cause in court, but does extend so as to include communications made by one to his legal adviser whilst engaged and employed in that character, and when the object is to get his legal advice and opinion as to legal rights and obligations; although the purpose be to correct a defect of title by obtaining a release, to avoid litigation by compromise, to ascertain what acts are necessary to constitute a legal compliance with an obligation and thus avoid a forfeiture or claim for damages, or for other legal and proper purposes not connected with a suit in court.

The rule thus qualified is still open to many well defined exceptions. The person consulted must be of the profession of the law, and it is not enough that the party making the communication thinks he is. *Fountain* v. *Young*, 6 Esp. R. 113. He must be consulted or employed in the particular business to which it relates. *Wilson* v. *Rastall*, 4 T. R. 753. The communication must be made during his employment and not before (Bul. N. P. 284) nor after. *Cobden* v. *Kendrick*, 4 T. R. 432. So the privilege does not extend to matters not communicated by his client as confidential, but facts known of his own knowledge (Lord Say and Seal's case, 10 Mod. 40), nor to the fact of the execution of a deed, especially if attested by him (*Doe* v. *Andrews*, Cowp. 846), nor to the handwriting of the client, though the knowledge of it has been acquired in consequence of the employment (*Hurd* v. *Moring*, 1 Car. & P. 372), nor to the fact of his client having sworn to an answer in Chancery (*Doe* v. *Andrews*, Cowp. 846), and so of other collateral facts not confidentially communicated.

With these limitations we think that conformably to the principle upon which the rule is founded, the privilege extends to communications made to a legal adviser, duly qualified as such, employed and acting in that capacity, where the object of the party is to obtain a more exact and complete knowledge of the law affecting his rights, obligations, or duties, relative to the subject matter to which such communications relate. *Foster* v. *Hall*, 12 Pick. 89 *et seq.*

[1] *Bramwell* v. *Lucas*, 2 Barn. Cress. & Cress. 745.

We have said that communications made to a solicitor or counselor at law are privileged under certain restrictions. It now remains in this connection for us to define the class of persons falling within this category.

Blackstone says[1] that "an attorney at law is one that is put in the place, stead, or room of another to manage his matters of law." They are now formed into a regular corps, and are admitted to the execution of their office by the superior courts of Westminster Hall, and in this country usually by the courts of *dernier* resort, and are in all points officers of the respective courts to which they are admitted, and usually are regarded as officers of all the courts of record in the State where they are admitted by the State Courts. They have many privileges on account of their attendance on the court, and for that and other reasons they are peculiarly subject to the censure and animadversion of the judges for malpractice in office. No man can practice as an attorney in any of those courts which are courts of record but such as are regularly admitted and sworn as an attorney of that particular court, or of some superior court, including by such admission the right so to do.

In our ecclesiastical tribunals, created for the purpose of enforcing a due observance of the canons of the Church, we have no separate and distinct class learned in ecclesiastical law who make a professional business of it.

The Church requires but one qualification to stand as counsel or adviser in the prosecution or defense of an accused member, that is, that the person so acting as counsel shall be a member of the Church; and such person, while acting in such relation, should enjoy the same privileges, immunities, and exemptions as are enjoyed by attorneys and counselors at law. "There is," says Mr. Greenleaf, "one other situation in which the exclusion of evidence has been strongly contended for on the ground of confidence and the general good, namely, that of clergymen, and this chiefly, if not wholly, in reference to criminal conduct and proceedings, that the guilty conscience may, with safety, disburden itself by penitential confessions, through the spiritual advice, instruction, and discipline, seek pardon and relief. The law of

[1] 3 Blackstone, 25.

papal Rome has adopted this principle in its fullest extent, not only excepting such confessions from the general rules of evidence, but punishing the priest who reveals them."[1]

There are many of the States that by statute have provided that no minister of the Gospel, or priest of any denomination whatever, shall be allowed to disclose any confessions made to him in his professional character in the course of discipline enjoined by the rules or practice of such denomination. Best, Justice, said that "he, for one, would never compel a clergyman to disclose communications made to him by a prisoner, but that if he chose to disclose them in evidence he would not restrain him from so doing." In Scotland confessions made to a clergyman or minister of the Gospel in order to obtain spiritual advice and comfort are not required to be given in evidence. But such exclusion does not include communications made to a minister in the ordinary course of his duty. The common law encourages the penitent to confess and unburden his conscience so that he may receive consolation. Yet the clergyman, minister, or priest, to whom such confession is made, is compelled to testify to such confessions. By the common law there is no distinction between ministers and other persons. All confessions not imparted to attorneys and counselors at law, or to some of the classes previously enumerated, are required to be disclosed; but, as we have before suggested, in ecclesiastical trials the rules of exclusion should be the same in favor of ministers of the Gospel as they are in favor of solicitors, attorneys, and counselors at law.

The same exemption and protection has been claimed for members of the medical profession in regard to information acquired in their professional character and communicated to them in such professional character confidentially; this is secured to them by statute in some of the States.[2] It is true that, owing to

[1] 1 Greenleaf's Ev., Sec. 447.

[2] The testimony of Smith, the physician, as to what he discovered and was informed of when he was consulted by the defendant professionally in 1830, was illegal and improper, and ought not to have been received. By the revised statutes a physician is not only excused, but prohibited, as a witness, from disclosing information which he has acquired in attending a patient in a professional character, and which information was necessary to enable him to prescribe for such patient. (2 R. S. 406.) From the testimony as reported by the Master, I infer that Dr. Smith at first declined answering as to what he had thus

their professional relation, they usually exert a greater or less degree of influence, and in order to make a confession voluntary they should be freely made by a person charged with an offense. The law, however, does not undertake to determine. This relationship destroys that freedom of will which is essential to the admissibility of confessions as evidence. Hasty confessions may be easily extorted by threats or promises from a person accused of a crime when in a state of agitation and alarm, and therefore all such confessions are excluded upon another principle. Even the slightest influence, say the books, is sufficient to exclude them, and in determining whether the party is influenced by the emotion of hope or fear, the court or presiding officer may take into consideration the relation existing between the accused and the person or persons to whom the confession is made. By the revised statutes of New York[1] it is provided that "no person duly authorized to practice physic or surgery shall be allowed to disclose any information which he may have acquired in a professional character and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon." Statutes to the same effect have been enacted in Michigan, Wisconsin, Iowa, and Missouri. The question has been sometimes considered in those States where the statutes are express, as to whether the party himself may waive the privilege or not, and it has been held, not only as it regards the relation of physician and patient, but as it regards the minister and member, or attorney and client, that the privilege is the privilege of the party and not of the physician, minister, or attorney, and that the party may waive it; but the physician, minister, or attorney can not do so without the consent of

discovered when consulted in his capacity of physician; but on being told by the Master that he was obliged to make the disclosure, he submitted to what he supposed to be a legal duty. Indeed, it is expressly stated in the brief of the complainant's counsel which was handed up to the court in this case, that the physician declined making any disclosure as to the disease under which the defendant was laboring until he was compelled by the Master to answer. The Master mistook the law on this subject; and the testimony being thus obtained in direct violation of this statutory provision, it should be rejected or laid entirely out of consideration in deciding whether the adultery charged in the complainant's bill is established by the proofs. *Johnson* v. *Johnson*, 4 Paige, 468.

[1] Revised Statute, 406, sec. 73.

the person whose confessions are sought to be used in evidence against him.

There is still another class of privileged communications: such as are made to judges and arbitrators. It is considered dangerous to allow judges or arbitrators to state what occurred before them. On this ground the grand jury were advised not to examine the chairman of a quarter session as to what a person testified on a trial in that court; and it is deemed impolitic to call upon arbitrators, or a jury, or a Church committee, to disclose the ground of their award or verdict.

The declarations or admissions of jurors, arbitrators, judges, or committeemen, made subsequent to the rendition of their verdict, award, or finding, are not admissible in support of a motion to set aside; neither will the affidavit of a juror or arbitrator be received to impeach the verdict or award for mistake or error in respect to the merits, or to prove irregularities or misconduct either on his own part or that of his fellows. But affidavits of jurors or arbitrators may be received to support such verdict or award.[1]

There are some other grounds, founded upon public policy, upon which the testimony of certain witnesses is excluded, where their previous acts are inconsistent and irreconcilable with the facts they are called upon to prove. Thus, it has been held that where a party to a negotiable instrument has given it credit and currency by his signature, that afterwards he shall not be permitted, in a suit between other parties, to prove that the negotiable instrument was originally invalid. Justice M'Lean, in speaking of incompetency upon this ground, said: "It is a well settled principle that no man who is a party to a negotiable note shall be permitted, by his own testimony, to invalidate it." Having given it the sanction of his name, and thereby added to the value of the instrument by giving it currency, he shall not be permitted to testify that the note was given for a gambling consideration or under any other circumstances which would destroy its validity.[2] Thus the first indorser of a promissory note

[1] *Smith* v. *Chatham*, 3 Kane's R. 57; *Dana* v. *Tucker*, 4 John. 487; *Owen* v. *Warburton*, 4 Bross & Pull, 326; *Vaise* v. *Dlaval*, 1 Tenn. R. 11.

[2] *Bank of the United States* v. *Dunn*, 10 Curtis's Dec. 21; *Walton et al. Assignee of Sutton* v. *Shelly*, 1 Tenn. R. 296.

was not permitted to prove that there was a secret understanding between himself and the assignee that he should not be held responsible for the payment of the note. Such evidence would, if admitted, seriously affect the credit of this description of paper, and it might, in many cases, operate as a fraud upon subsequent indorsers. An apparent exception to the rule, however, obtains in case of defense predicated upon usury, gambling, etc., for it has been held that, notwithstanding the testimony tends to destroy the value of the paper, the borrower of the money is a competent witness to prove the whole case.[1] The reason of the exclusion, as given by Lord Ellenborough in the case of *Walton* v. *Shelley Ubi*, "is not that the witness is interested, or that he is one of the parties upon the record, but that he is inadmissible on the grounds of public interest and the public convenience; to admit his evidence would open a door to fraud."[2] A rule established by some of the courts excludes the witness only when the paper is negotiable and put into circulation before its maturity.[3] The indorser of a negotiable note, while he is incompetent to testify to facts that tend to render the note void in its inception, may be admitted as a witness to prove facts subsequent to the indorsement, and which destroy the title of the holder.[4]

Declarations and admissions of a party, when made with a view to compromising matters in litigation or dispute, are, under certain qualifications, held to be inadmissible in evidence. For instance, if one of the parties offers to pay to the other a sum of money with a view to a compromise of the matter in controversy, such offer is not admissible in evidence, for it must be permitted to men to endeavor to buy their peace without being prejudiced

[1] 7 Tenn. R. 56. [2] *Rohrer* v. *Morning Star*, 18 Ohio, 587.

[3] *Treon* v. *Brown & Fuller*, 14 Ohio, 483.

[4] *Woodhull* v. *Holmes*, 10 John. 230; *Webb* v. *Danforth*, 1 Day, 301; *Barber* v. *Arnold*, 1 Kane's R. 258. It is, however, objected to this deposition that the witness is incompetent from interest. It is a sufficient answer to this objection that the interest of the witness is against the party who calls him. It is objected again that a party to negotiable paper can not be called to impeach its validity. In the case of *Woodhull* v. *Holmes*, before cited, the Court say "that the indorser of a negotiable note may be called as a witness to prove facts subsequent to the indorsement and which destroy the title of the holder. The Court recognize this principle as the settled law on the subject." The deposition for these purposes, therefore, is properly received. *Stone* v. *Vance et al.*, 6 Ohio, 249.

by a rejection of their offers. Hence evidence of such offers or proposals is irrelevant, and are not to be taken as admissions of the legal liability of the party making them. A distinction, however, exists between the cases of an offer to pay money to settle a controversy and an admission of particular facts connected with the case made by a party pending a negotiation for compromise. The more convenient rule might be that which is applicable to communications between client and attorney, excluding as testimony every thing connected with the relation; which rule, if applied, would exclude every admission made during negotiation for such compromise—made with a view to the compromise. To some extent it has been attempted to intro duce the rule excluding all admissions of the parties—even admissions of particular facts—where it appeared that they were expressly stated at the time for the purpose and with a view to compromise. The admission, without exception, of collateral facts, is now firmly sanctioned by authority, and the evidence of the admission by a party, though made under a treaty of compromise. [1]

[1] The rule undoubtedly is, that an offer to pay any sum by way of a pending controversy is not to be given in evidence against the party making it. This rule is founded on policy, that there may be no discouragement to amicable adjustment of disputes by a fear that if not completed the party amicably disposed may be injured. But this rule seems confined to the mere offer of compromise, for it is held that any independent facts admitted during the treaty for a compromise may be given in evidence as confessions. This limitation or exception to the rule is laid down in Starkie and Phillips, and was adopted by this court in the case of *Marsh* v. *Gold*, 2 Pick. 285; *Gerrish* v. *Sweetser*, 4 Pick. 377.

That no advantage shall be taken of offers made by way of compromise, that a party may, with impunity, attempt to buy his peace, are well established rules of law, to which our reason and our feelings at once assent. But I am not prepared to admit that what a party may state as a fact, though the statement may be made in the course of a negotiation for a compromise, or may be connected with an offer to purchase peace, will not be as binding as if the fact had been disclosed in any other way. If a man says to me, I do not admit that I owe you any thing, but rather than be sued I will give you a hundred dollars, it would be most unjust to suffer me to avail myself of this offer to recover against him. But if one tells me, It is true I justly owe you a hundred dollars, and will give you fifty if you will give up your debt, I apprehend there is no rule of law so absurd and unjust as to prevent my availing myself of my debtor's confession because he connected with it an offer of compromise. *Murray* v. *Coster*, 4 Cowen, 635; Greenl. Ev. sec. 192; *Fuller* v. *Hampton*, 5 Conn. 416; *Sandborn* v. *Meilson.*, 14 N. H. 501.

CHAPTER VII.

MATTERS OF PUBLIC INTEREST.

THESE may be classed under four general heads; first, declarations made against the interest of the party making them; second, dying declarations; third, declarations relating to ancient possessions; fourth, declarations relating to matters of public interest. Declarations and entries made by a person since deceased, and against the interest of the party making the same, have been received as original and primary evidence. Entries by third persons are properly divisible into two classes, those that are made in discharge of official duty or in the course of professional employment, and those that are made as a matter of mere private enterprise. In order to render the former class admissible the act must be one that was the person's duty to perform, or which belonged to the transaction, and was part of the *res gestæ*, or that was its usual and proper accompaniment. If the act or the entry does not fall within the discharge of official duty, or professional employment, but has reference to extraneous matters, it is not admissible. In order to render the entries made by third persons competent and admissible in evidence the party making them must have proper knowledge of the fact, and there must have been no particular motive operating on the mind of the party to enter the transaction falsely, and the entry must be made at the time of the transaction. When offered in evidence it carries with it the whole statement, provided it does not go beyond those matters which it was his duty to enter.[1] Where the entry is one of a number of facts, which are usually connected the proof of the one affords a presumption that the others have taken place, and a fair entry,[2] such as

[1] *Percival* v. *Nanson*, 7 Eng. Law and Eq. R. 538.

[2] This brings us to the inquiry whether the original entries and memoranda were properly received in evidence. The defendants insist that they could only be used for the purpose of refreshing the recollection of the witness, and not as evidence to the jury. I may here remark that the entries and memoranda were made in the usual course of business, and are verified in the most ample manner by the witness, who made and whose duty it was to make them. The proof

usually accompany similar facts, and apparently contemporaneous with them, is received as original evidence of those facts. The entry being primary evidence as regards its admissibility, it is a matter of no moment whether the person making it be living or dead. The rule, however, is otherwise where the entry is only secondary evidence, and only admissible in consequence of the death of the person making it. In order to render them admissible, the party offering such evidence must establish the fact that the declarant is dead; that he possessed or was in a position to possess competent knowledge of the facts; and that his entries or declarations were at variance with his interest. Thus, if a person have a peculiar means of knowing a fact, and makes a declaration or written entry of that fact, which is against his interest at the time, if he could have been examined to it in his life-time, it is evidence of the fact as between third persons after his death; and, therefore, an entry made by a physician in a book of having delivered a woman of a child on a particular day, referring to his ledger in which he has made a charge for his attendance, which was marked as paid, is evidence upon an issue as to the age of such child at the time of suffering a recovery. Le Blanc, Justice, in delivering the opinion of the Court, said: "On inquiring into the truth of facts which happened a long time ago, the Courts have varied from the strict rules of

could not well have been more satisfactory than it is. But the witness was unable to call to mind the original transaction, and the question is whether memoranda and entries thus verified should be allowed to speak for themselves. I think they should. Although it is not then absolutely necessary to pass upon the question it was fully considered in *Merrill* v. *Owego R. R. Co.* 16 Wend. 586, and we came to the conclusion that evidence of this character was admissible. *Lawrence* v. *Barker*, 5 Wend. 301, does not lay down a different rule. The memorandum, in that case, was not made in the usual course of business, and as a part of the proper employment of the witness. I do not see how it is possible to doubt that such evidence ought to be received. There are a multitude of transactions occurring every day in banks, the offices of insurance companies, merchants' stores, and other places which after the lapse of a very brief period can not be proved in any other way. It is not to be supposed that officers and clerks in large trading and other business establishments can call to mind all that has been done in the course of their employment, and when their original entries and memoranda have been duly authenticated, and there is nothing to excite suspicion, there can be no great danger in allowing them to be laid before the jury. *Bank of Monroe* v. *Culver*, 2 Hill, 535.

evidence applicable to facts of the same description happening in modern times, because of the difficulty or impossibility, by lapse of time, of proving those facts in the ordinary way, by living witnesses." On this ground hearsay and reputation, which is no other than the hearsay of those who may be supposed to have been acquainted with the facts handed down from one to another, have been admitted as evidence in particular cases. On that principle stands the evidence in cases of pedigree, of declarations of the family, or of members thereof who are dead, or of monumental inscriptions, or of entries made by them in family Bibles. The like evidence has been admitted in other cases, where the Court was satisfied that the person whose entry was offered in evidence, had no interest in falsifying the fact; but, on the contrary, had an interest against his declaration or written entry.[1]

The principle upon which evidence of this character is receivable is the improbability, owing to the interest of the party being adverse, to the making of it falsely. The law deems the regard which men ordinarily have for their own interest a sufficient guarantee that the declarant had the requisite knowledge of the facts, and that his declarations made with reference to them are true. Apprehensions of imposition or fraud being practiced in the making of the declarations or entries are rendered still more improbable from the fact that they are not ordinarily receivable as evidence during the life-time of the declarant. It is always permissible for the party against whom such declarations are produced to point out any sinister motive for the making of such declarations or entries. It is true, when the proper ancillary proof has been made by the party offering such entry or declaration, that sinister motives would not have the effect

[1] *Higham* v. *Ridgway*, 10 East 120.

Lord Ellenborough, C. J. The ground upon which this evidence has been received is, that there is a total absence of interest in the persons making the entries to pervert the fact, and, at the same time, a competency in them to know it. The impression on my mind is the same now as it was at the trial, that the evidence is admissible on the authority of the cases. It has long been an established principle of evidence, that if a party who has knowledge of the fact make an entry of it, whereby he charges himself or discharges another upon whom he would otherwise have a claim, such entry is admissible in evidence of the fact because it is against his own interest. *Doe*, Lessee of *Reece* v. *Robson*, 15 East, 33.

to exclude them as evidence, but would materially lessen, if not entirely destroy their weight. The interest with which the declarations are offered in evidence is required to be at variance with the party making such declarations; and such variance must be of a pecuniary nature.[1] The mere apprehension of possible danger of prosecution for crime is not sufficient to form a basis for their exclusion.[2]

It has sometimes been contended that it is not material that the declarant should have an actual interest contrary to his declarations; but this position has not received the sanction of the courts. Lord Eldon[3] said: "The cases satisfy me that the evidence is admissible of declarations made by persons possessed of competent knowledge of the subject to which such declarations refer, where their interest is concerned, and the only doubt I have entertained was as to the position that you were to receive evidence of declarations where there is no interest. Where the evidence consists of entries in books of account, they are admissible as a part of the *res gestæ*, where it is shown that they are made in the ordinary course of business or duty; such evidence is not regarded as secondary, but as primary evidence, and there is no difference in the principle of admissibility between a written entry and an oral declaration where they constitute part of the *res gestæ*. Thus the declaration of an agent concerning his having received money from his principal, is admissible where it is made at the time of receiving the money. The admissions or declarations of an agent relative to the settlement of an account made seventeen months after the pretended settlement, when there is no proof of a settlement in fact, are not admissible in evidence against his principal. The acts and declarations of the agent at the time of the transaction are binding upon the princi pal, but what he says at another and subsequent period is not evidence against the principal. His declarations are received not as admissions, but as part of the *res gestæ*."[4]

[1] *Davis* v. *Lloyd*, 1 Car. & Payne, 276.

[2] The Sussex Peerage Case, 11 Clark & Finn. 85.

[3] *Barker* v. *Ray*, 2 Russ. 63.

[4] MARCY, J.—The decision of the court in 6 Cowen, 90, where this cause is reported, on a motion for new trial on the part of the defendant (a verdict then having been found for plaintiff), disposes of most of the questions presented

But in regard to declarations in general, they not being entries or acts of the character just referred to, are admissible on the ground of having been made against the interest of the declarant. Before, however, such declarations are receivable in evidence, the adverse interest of the declarant should be made to appear, either from evidence *aliunde* or from the nature of the transaction; and it is not deemed sufficient that in one or more points of view a declaration may be against interest if it appears, upon the whole, that the interest of the declarant would be rather promoted than impaired by such declaration. Thus, in an action of trespass for breaking and entering a particular close, it became material to identify the close as being parcel of an estate out of

by the case now brought before us. There is one question, however, arising on the present case which was not then under consideration. It is contended that improper evidence was admitted to establish the settlement between the defendant and Henry R. Teller. The defendant attempted to show, and I think did show sufficiently, that Teller was the plaintiff's agent in relation to the business out of which the claim embraced in this suit arose. The defense on the trial was, that the defendant had, in good faith, paid over the money that the plaintiff had a right to receive on the compromise of the ejectment suits to Teller, the plaintiff's agent, and that the whole matter had been fully settled with him as such agent. To make out this defense, the defendant was permitted to introduce an account current between him and Teller, the last entry on the debit side of which was in November, 1816. There was no evidence that this account was made out on a settlement between the parties to it, or that it ever had the sanction of Teller before the time when he made an affidavit in March, 1818, which was also received in evidence in behalf of the defendant. In this affidavit Teller says that the allegations and matters in a certain answer put into a bill in Chancery by the defendant are true. The answer contained the allegation of the settlement which the defendant attempted to prove, and the defendant was permitted to read, in evidence, a part of the answer which was explanatory of the account. It appears to me that the judge erred in receiving this evidence. His decision proceeded on the ground that Teller was the agent of the plaintiff, and that his acts and admissions in relation to the matters within the scope of his agency might be proved against his principal. The agent's acts are the acts of the principal, and may be proved in the same manner as the party's own acts. It is to be observed, however, that the specific act of a settlement of the plaintiff's claim in this case was not attempted to be proved. As I have before observed, there was no proof that the account current had ever been seen by Teller before the date of the affidavit.

Was the affidavit admissible in evidence? The plaintiff was an entire stranger to the Chancery suit in which it was used; he could not, therefore, be concluded or affected by the proceeding or proof in that suit. If, upon any principle, the affidavit could be received, it must be as the admission of an agent.

which certain ancient rents had been reserved in an ancient conveyance. The party who sought to do this produced the books of a person under whom he derived title to those ancient rents, in which that person acknowledged the receipt of rents from the person who had conveyed the close to plaintiff, which rent corresponded with the rent which had been anciently reserved. This evidence was held to be inadmissible by the courts of the King's Bench (even supposing, according to the authorities, that there was reasonable probability of the entry being used against the maker for the purpose of proving the payment), still it could be used by the representative of the maker to prove title to the land. The entry might, upon the whole, be in favor of the maker's interest.[1]

The general rule on this subject is, that what an agent does or says within the scope of his authority, is binding upon the principal. Not only the agreement that he makes, but all his declarations affecting or qualifying such agreement, are binding on the principal; but what an agent says at another time, or of his own authority, is not evidence against the principal. (Starkie on Ev. 4 pt. 42–3.) In making the settlement with the defendant—if one was ever made—Teller might be considered the agent of the plaintiff, and all that he did or said on that occasion might properly be received in evidence; but what he said at another time, though it related to the same transaction, was not admissible testimony. It will be recollected that the affidavit was not made until near seventeen months after the last item in the account current.

In the case of *Bentham* v. *Benson* (Gow's N. P. Rep. 45), Chief-Justice Dallas says: "It is not true that where an agency is established the declarations of an agent are admitted in evidence merely because they are his declarations. They are only evidence when they form a part of the contract entered into by the agent on the behalf of his principal, and in that case they become admissible." To this effect is the law laid down in the case of *Fairlie* v. *Hastings* (10 Vesey, 123). Where a party is bound by the act of his agent, and the declarations of the agent qualify or affect that act, these declarations may be proved against the principal; but they are not proved as admissions or declarations merely, but as part of the *res gestæ*. The act and the words together make the whole thing to be proved. The fact to be established in this case was the settlement by the agent of the plaintiff with the defendant, or the payment to the agent of all the moneys received on account of the plaintiff. What was done and said at the settlement, or when the moneys were actually paid over, might well be proved, but not Teller's representation of it, even if it had been made in an hour after the business was closed. The length of time between the adjustment of accounts and the making of the affidavit seems to me to take away all plausibility for admitting it as proper evidence in this cause.—*Thallheimer* v. *Brinckerhoff*, 4 Wendell, 394, *et seq.*

[1] 5 Tenn. R. 121; 1 Phillips's Ev. 306.

Entries of receipts of rent made by a deceased executor who had an interest in the land which was claimed has been held admissible evidence for a person claiming the land under him, where the rents have been received by the deceased in his capacity of executor, the entries not having been made by him in his character of landlord.[1] It frequently happens that an entry purports, in the first place, to charge a person, and afterwards to discharge him. In such a case the entry can not be used against the maker of it unless the whole is read in evidence. There is a remarkable class of cases, according to which entries made by a deceased person of the receipts of ecclesiastical dues have been received in favor of the parties claiming the same interest which the maker of the receipts had; thus the books of a deceased vicar or rector have been frequently admitted as evidence against his successor.[2] And it has been determined that evidence might be admitted of receipts of payment entered in private books by persons not obliged to keep such books, nor to account to any one for the sums received. It does not seem to have been contrary to principle to admit evidence of rectors' and vicars' books, for the entries can not be used by the parsons themselves, and there is no legal privity between them and their successors.[3]

The rule that we have been considering extends to admissions made by the owner of property, provided that the admissions emanated from such owner at the time he owned the property, and would, therefore, have been evidence against him were he the immediate party to the suit or proceeding. His estate or interest in the same property afterwards coming to another by descent, devise, right of representation, sale, or assignment—in a word, by any kind of transfer, whether it be by the act of the law or the act of the parties, whether the subject of the transfer be real or personal estate, corporeal or incorporeal, chose in possession or chose in action, where the successor is said to claim under the former owner, and whatever he may have said affecting his own rights before parting with his interest—is evidence equally admissible against his successor claiming from him either immediately or remotely. And, in this instance, it makes no difference

[1] *Spears* v. *Morris*, 9 Bing. 687.

[2] *Armstrong* v. *Hewitt*, 4 Pr. 216.

[3] *Parson* v. *Bellany*, 4 Pr. 190; *Maddison* v. *Nuttal*, 6 Bing. 226.

whether the declarant be dead or alive. Though he be a competent witness, and present in court, his admissions are receivable in evidence. This doctrine proceeds upon the idea that the present claimant to the property stands in the place of the person from whom his title is derived. He takes it *cum onere*, and as the predecessor might have taken a qualified right, or sold, charged, restricted, or modified an absolute right; and as he might furnish all the necessary evidence to show its state in his own hands, the law will not allow third persons to be deprived of that evidence by any act of transferring that right to another.

The same rule prevails in its utmost extent as to personal property; thus, on an appeal between two towns, contesting the settlement of a negro, it seems that the declarations of a person made in respect to his title to the negro while in possession of him as a slave are receivable in evidence.[1] On the same principle a will and inventory of a negro was held to be evidence that the testator claimed the negro as his slave, and that he was inventoried as such. The declarations of a debtor, who continues in possession of property after a sale or transfer in any way by him to another, showing fraud in the transfer, is evidence against the vendee in a contest between him and his creditors. But in one case such declarations were denied to be used in this way unless shown to have been with the consent or permission of the vendee.[2]

The declarations of a person in possession showing in what character they are in possession are receivable as part of the *res gestæ* itself. Thus the declarations of a tenant are constantly received as to whom he holds under, not as evidence of title, but as evidence of possession, and to explain the character of that possession.[3]

CHAPTER VIII.

DYING DECLARATIONS.

THE second head constituting an exception to the rule rejecting hearsay evidence, is that which is allowed in the case of dy-

[1] *Overseers of Germantown* v. *The Overseers of Livingston*, 2 Kane's R. 106.
[2] *Talcott* v. *Wilcox*, 9 Conn. 134.
[3] *Babb.* v. *Clemson*, 10 Serg. & Rawle, 419.

ing declarations. It was formerly held that dying declarations were receivable in evidence in all cases, civil as well as criminal; but it is now universally conceded that they are not admissible as such, except in cases of homicide, where the death of the deceased is the subject of investigation, and the dying declarations relate to the circumstances of the homicide.[1] In order to the admission of dying declarations upon a trial for the murder or homicide of the declarant they must be made when the party making them is *in extremis*,[2] unless they constitute a part of the *res gestæ*, or come within the exception of declarations made against interest,[3] and the declarant when he makes them must

[1] Dewey, J., says: "The admission in evidence of the statement of the party injured as to the cause and manner of the injury which terminated in her death may be sustained upon the ground that the testimony was of the nature of the *res gestæ*. The witness describes the situation in which he found the party, her appearance, and her request for assistance, and in connection therewith, her declaration of the cause of the injury. The period of time at which these acts and statements took place was so recent after the receiving of the injury as to justify the admission of the evidence as part of the *res gestæ*. In the admission of testimony of this character, much must be left to the exercise of the sound discretion of the presiding judge. *Commonwealth* v. *John M'Pike*, 3 Cushing, 184.

[2] It is error to admit evidence of dying declarations, without first finding that the deceased was conscious of his condition when making them. It is not error to allow a witness to state the substance of competent dying declarations, although he may not be able to give the precise words.

Birchard, J. We should not think the Court erred in permitting the substance of Hackett's statements to be given in evidence, although the witness was unable to give the precise words, and in leaving the credit of the narration, and the weight of the evidence to the jury, were there no other objections. The deceased alluded to both statements at the time, and by reaffirming them he made them as much his dying declarations as if he had then repeated them at length. The substantial objection to the proof is, that it was received without a preliminary inquiry by the Court, establishing the fact that the deceased not only made the declarations just before death, and while *in extremis*, but also that he was conscious of his true condition. It is this consciousness, coupled with the condition of the party, which supplies the place of an oath, and peculiarly distinguishes dying declarations from hearsay. In omitting this inquiry a majority of the Court believe there was error, and that for that cause alone new trial should be awarded. *Montgomery* v. *The State of Ohio*, 11 Ohio, 424–426.

[3] Thompson, C. J., delivered the opinion of the Court, assuming that Brown would have been a competent witness had he been living, and admitting that he was *in extremis* when the declarations were made, which were received in evidence (of which, however, there is very great doubt), the only question in the

be under the apprehension of death; he must be in a situation so extreme that every hope of this world is gone, every motive to falsehood is removed, and the mind is induced by the most pow-

case is, whether such declarations were at all admissible. No case, whether in English courts or in our own, has fallen under my observation, where such evidence has been admitted in a civil suit. Such testimony is inconsistent with two fundamental rules in the law of evidence. It is mere hearsay not under oath, and no opportunity is given for cross-examination; and writers on the law of evidence have, I apprehend, either fallen into a mistake, or been a little unguarded in laying down the rule relative to the admission of the dying declaration of a person, even in criminal cases. Phillips in his Treatise (p. 200), says: "Such evidence is constantly admitted in *criminal prosecutions*, and is not liable to the common objection against hearsay evidence." If he means to be understood that this is a general rule of evidence in criminal prosecutions, he is not supported by any adjudged cases. It is, I apprehend, confined to the single case of homicide, and so it seems to be considered by East in his Crown Law, Vol. i, p. 253: "Besides," says he, "the usual evidence of guilt in general cases of felony, there is one kind of evidence more peculiar to the case of homicide, which is the declaration of the deceased after the mortal blow as to the fact itself, and the party by whom it was committed." Evidence of this sort is admissible in this case on the fullest necessity. For it often happens that there is no third person present to be an eye-witness to the fact; and the usual witness on occasion of other felonies, namely, the party injured, is got rid of. Whatever might have been the ground on which this kind of evidence was first admitted in cases of homicide we find it has long been an established rule in such cases; and, I may say, in such cases only. For wherever this rule is recognized by elementary writers, the cases referred to in support of it will be found to be those of homicide only. Stra. 499; 2 Leach, 569, 638; 12 Vin. 118; 1 East's C. L. 353. Baron Eyre, in Woodcock's case considers it an exception to the general rule which requires that witnesses should be examined in open Court on oath, and an opportunity afforded for cross-examination. Phillips (p. 201), in treating of this rule in criminal proceedings, says: "The same kind of evidence is admissible in civil cases, as well as in trials for murder." But he is not supported by any of the cases referred to, or by any other adjudged cases that I have found. Wright, ex dem. *Clymer* v. *Littler*, 3 Burr. 1244. Wm. Blacks. 345, has been urged in support of this rule. But a recurrence to the facts will show that the circumstances of that case were special and peculiar, and the admission of the declaration of Medlicott was not supported under this rule. Lord Mansfield, in pronouncing the opinion of the Court, says: "The testimony comes out on the cross-examination of the defendants' counsel, and no objection made to it," thereby expressly excluding the idea that the evidence was admitted merely as the dying declaration of Medlicott. Nor does the case of *Aveson* v. *Lord Kinnaird*, 6 East, 188, which has also been pressed upon the Court, in any measure support such a rule of evidence. It was an action on a policy of insurance on the life of the plaintiff's wife, warranted in good health, when the policy was affected, and the dying declarations of the wife as to her state of health at that time, were admitted, but not as declarations made *in*

erful considerations to speak the truth. A situation so awful is considered by the law as the equivalent of an oath. Where the declarant, if living, would be incompetent to testify by reason of a want of religious belief, or by reason of infamy of character, or for any other cause rendering him incompetent, his dying declarations are not receivable in evidence, as the oath derives the value of its sanction from the party's moral sense of accountability to God. Whenever it appears that the declarant was incapable of this religious sense of accountability to his Maker, whether from infidelity or otherwise, his declarations are alike inadmissible.

From what we have before said, it is apparent that preliminary to the admission of dying declarations as evidence, there must be proof that they were made under a sense, by the party

extremis by a person who might have been a witness if living, for she could not under any circumstances have been a witness if living. The plaintiff had produced a surgeon as a witness to show from his examination of her, and what she told him, that she was in a good state of health, and her account to another person of her health at the same time, Lord Ellenborough said, "was but a sort of cross-examination of the same witness, that the inquiry was upon the subject of her own health, which was a fact of which her own declaration was evidence; that such declarations are always received on such inquiries, and must be resorted to from the very nature of the thing." I think it may safely be affirmed that no such rule of evidence in civil cases is to be found in practice in the English Courts; with us there is certainly none such, and wherever it has been in any measure alluded to, it has uniformly been with disapprobation. That the question is still open with us appears from the case of *Jackson* v. *Vredenburgh*, 1 John. Rep. 163, where it is said that it will be unnecessary to determine whether under any and what circumstances the declarations of a competent witness *in articulo mortis* can be introduced as legal evidence in a civil cause. In *Jackson* v. *Kniffen*, 2 John's. Rep. 35, Mr. Justice Livingston says if the declarations of dying persons are ever to be received in evidence (on which if *res integra* much might be said), yet in civil cases they never should be admitted. In *Capron* v. *Austin*, 7 John. Rep. 96, it is said that the law requires the sanction of an oath to all parol testimony. It never gives credit to the bare assertion of any one, however high his rank or pure his morals, and it is fairly to be inferred from this case, that the Court meant to say that declarations *in extremis* were inadmissible evidence, except in the single case of homicide. Having an opportunity to cross-examine a witness is a high and important right, and ought not to be violated, except from the most imperious necessity, and I am persuaded that neither principle nor policy requires the adoption of any such rule of evidence in civil cases. The dying declarations of Brown, in the case before us, ought not, therefore, to have been used in evidence. The verdict must accordingly be set aside, and a new trial awarded, with costs, to abide the event.

making them, of impending death. The court must be satisfied that they were made under that solemn sanction, but it may be inferred, from the express language of the declarant, or from the opinion of medical or other attendants stated to him, or from his conduct, or other circumstance of the case, all of which are resorted to in order to ascertain the state of the declarant's mind.[1] The dying declarations of the deceased are admissible only to prove those things which would have been competent for him to have testified to if sworn and a witness in the cause. The declarations must, therefore, be confined to facts, and mere matters of opinion are not admissible, and they must be confined to what is relevant to the issue. Dying declarations are ordinarily offered by the prosecution in support of the charge contained in the indictment; but they are equally admissible, and may be offered in evidence by the defendant. The declarations, before they should be received, should be complete in themselves; for if it is apparent that the dying man intended to complete or connect them with other statements, which, from any cause, he is prevented from making, they will be rejected. Where the deceased was asked who shot him, and he replied, giving the name of the prisoner, the declaration was held competent, although, from weakness and exhaustion, he was prevented from answering another question immediately afterwards propounded to him.[2] Where the statement of the deceased witness was reduced to writing and signed by him at the time it was made, the writing should be produced, or its absence satisfactorily accounted for, before parol evidence or a copy of the statement would be admitted to supply the omission.[3] In some of the States, provisions are made by statute for taking the deposition of the deceased, and where the deposition has been taken under the statute, and is inadmissible in evidence for want of legal formality, it may still be treated as the dying declaration of the party made *in extremis*.[4]

[1] John's case, 1 East, 354; *Rex* v. *Moseby*, Mood.'s Cr. Cases, 97; *Smith* v. *The State*, 9 Humph. 9; *Oliver* v. *The State*, 17 Ala. 587.

[2] *M'Lean* v. *The State*, 16 Ala. 672.

[3] *Rex* v. *Gay*, 7 C. & P. 23; *Leach* v. *Simpson*, 1 Law & Eq. R. 58.

[4] On the trial of an indictment for the murder of a wife by her husband, the declarations made, *in extremis*, as to the cause of her death, are competent

The substance of the declarations, where they are not reduced to writing, may be given in evidence.[1] It is for the court, in the first instance, to determine upon the admissibility of the declarations, upon proof of the condition of the mind of the deceased at the time they were made, and if the proof does not satisfy the court that they were made *in extremis*, and that they are dying declarations within the law, they should not be permitted to go to the jury.[2] The declarations, however, being

evidence against the prisoner. So held by the chancellor and judges, their opinions being required by the Governor, pursuant to the statute.

The prisoner was tried at the Rensselaer *Oyer* and *Terminer*, in July, 1845, before Parker, Chief Judge, and others, for the murder of his wife by poisoning with arsenic. On the trial, the district attorney, after laying a proper foundation, offered to give in evidence the dying declarations of the deceased as to cause of death. The counsel for the prisoner objected that dying declarations could not be received where they came from the wife against the husband; but the Court overruled the objection, and admitted the evidence. The prisoner having been convicted, the case was reported to the Governor, who, on the second day of September, during the last vacation, consulted his legal advisers in such cases. (See 2 R. S. 658, §§ 13, 14.) The Chancellor, the Chief Justice, and Mr. Justice Beardsley (Jewett, J., being absent), were of opinion that the evidence was properly admitted; that the dying declarations of the wife may be received against the husband, on the same principle that she is allowed to testify against him where the complaint is of violence against her person. Mr. Justice Jewett, being afterwards consulted by his brethren, declared himself of the same opinion. *The People* v. *Green*, 1 Denio, 614, 615.

Rex v. *Woodcock*, 2 Leach, Cr. Cases, 563.

[1] *Nelson* v. *The State*, 13 S. & M. 500.

[2] Dying declarations are such as are made relating to the facts of an injury of which the party afterward dies, under the fixed belief and moral conviction that immediate death is inevitable, without opportunity for repentance and without hope of escaping the impending danger. The court should determine upon the admissibility of such declarations upon hearing proof of the condition of the mind of the deceased at the time they were made; which proofs, it is advised, should not be taken in the hearing of the jury impaneled to try the accused.

The substance of dying declarations may be given in evidence to the jury, and, if necessary, through interpreters.

If dying declarations are permitted to go to the jury, then also may they hear the whole evidence as to the condition of mind of the deceased, and other circumstances at the time they were made, and pass upon their credibility and weight.

These two assignments of error may be considered and disposed of together. The statements of the deceased as to the cause of the injury from which death finally results, when dying declarations within the meaning of the law are admitted in evidence on the ground of necessity, and the rule under which they

admitted by the court, the whole evidence, including that heard by the court on the preliminary inquiry as to the condition of the mind of the deceased at the time they were made, should then go to the jury to enable them advisedly, and from all the light of facts and circumstances afforded, to determine upon the credibility, weight, and force of the evidence.

The condition and state of the mind of the deceased, with all the attendant circumstances bearing upon the question, are

are admitted forms an exception in the law of evidence. The accused under the rule has not the benefit of "meeting the witness against him face to face"—a constitutional right in all criminal trials, with this solitary exception, he is deprived of the security of an oath attended with consequences of temporal punishment for perjury. He is deprived of the great safeguard against misrepresentation and misapprehension—the power of cross-examination. The evidence is hearsay in its character; the statements are liable to be misunderstood and to be misrepeated upon the trial, and the evidence goes to the jury with surroundings tending to produce upon the mind emotions of deep sympathy for the deceased, and of involuntary resentment against the accused.

It is vain to attempt to disguise the infirmities and imperfections of the human mind and its susceptibility to false impressions under circumstances touching the heart and exciting the sympathies; and the law has wisely, in case of dying declarations, required all the guarantees of truth the nature of the case admits of. The principle upon which such declarations are admitted is that they are made in a condition so solemn and awful as to exclude the supposition that the party making them could have been influenced by malice, revenge, or any conceivable motive to misrepresent, and when every inducement, emotion, and motive is to speak the truth; in other words, in view of impending death, and under the sanctions of a moral sense of certain and just retribution. Dying declarations are, therefore, such as are made by the party relating to the facts of the injury of which he afterwards dies, under the fixed belief and moral conviction that his death is impending, and certain to follow almost immediately, without opportunity for repentance and in the absence of all hope of avoidance, when he has despaired of life and looks at death as inevitable and at hand.

It is for the court in the first instance to determine upon the admissibility of the declarations upon proof of the condition of the mind of the deceased at the time they were made; and if the proof does not satisfy the court beyond reasonable doubt that they were made in *extremity*, and that they are dying declarations within the law, they should not be permitted to go to the jury.

There can be no question that, tested by the principles here laid down, the declarations made by deceased to Izerman are not dying declarations, and we proceed to examine as to the declarations made to Eick.

Taking the words of the deceased that he "had a dangerous wound and must die," and the remark on parting with Eick, "that they would never meet again," without looking to the attending facts and circumstances, we should unhesitatingly conclude that the impression was upon his mind that he soon should

proper for their consideration, and there is no ground, upon principle or authority, for excluding from their consideration the statement of the deceased as to his apprehension of death, nor as to the surrounding circumstances constituting or forming the *res gestæ* and tending to establish the existence or non-existence of that condition of mind which would constitute his statements as to the cause of the injury, in law, dying declarations.[1]

CHAPTER IX.

ANCIENT POSSESSIONS.

THE third exception to the rule excluding hearsay evidence is in cases of ancient possessions, and in favor of the admission of ancient documents in support of such ancient possessions. Such declarations are, however, generally inadmissible when offered in support of private rights not affecting any public or general interest, except where they purport to constitute a part of the transaction or *res gestæ*. But it has often been made a question whether ancient documents are admissible in evidence where they are not shown to accompany and form a part of the legal transfer of title and possession. The better opinion is, that the document may be read in evidence if it appears to have been contemporaneous with the act of transfer and come from the proper custody. Documents found in a place in which, and under the care of persons with whom, such papers might natu-

die. The mere declarations or statements of the deceased as to his condition and expectation are not the only test from which to ascertain his true state of mind in this respect; but the court should look not only to his language, but to all the facts existing and surrounding the party at the time, before, and after the declarations were made forming the *res gestæ*, and tending to show his true state of mind. Upon this record we are not compelled to decide upon this ruling of the court; but the impossibility of knowing what effect upon the minds of the jury the hearing of this examination might have, or what tinge or coloring it might, in their minds, give to other evidence against the accused in case the declarations should not go to them finally as evidence, would suggest the propriety of sending the jury out in charge of a sworn officer pending this examination. *Starkey* v. *The People*, 17 Ills. 17.

[1] 1 Phillips's Ev. 238; 2 Starkie's Ev. 263; *Lambert* v. *The State*, 23 Miss. 355.

rally be expected to be found, or in the possession of persons having an interest in them, are in precisely the custody which gives authenticity to them. This rule is one of the grounds on which we insist on the genuineness of the Bible. The Scriptures were found in the proper custody or place, where alone they ought to be looked for. They were found in the Church, where they have been kept through a period of successive ages. They have been constantly referred to as coming from the proper depository where they purport to have been kept, and that fact has never been questioned by the most vigilant or the severest critics who have called in question the authenticity of the Scriptures themselves. According to the rules that we have before referred to, the burden, or onus, is on the objector to impeach the genuineness thereof, and not on the Christian to establish it; for their genuineness is *prima facie* established by the proof that they come from the proper custody. It is further requisite, in this class of cases, as near as the nature of the case will admit, to furnish some evidence of acts accompanying the documents offered in evidence, as a further assurance of their genuineness. A distinction exists between documents that bear date *ante litem motam*,—that is, before suit is brought or controversy moved,—and *post litem motam*. In the latter case the document requires some evidence of corroboration, even in cases where the traditional evidence is admissible.

In the former where the transaction is very ancient so that proof of contemporaneous acts are not easily obtainable, its production is dispensed with.[1] The general principle is, that where one claims under a deed or other instrument used in the conveyance of real estate which appears on the face of it to have been executed by virtue of a power from the grantor, the power or authenticated copy of it should be produced in evidence to support the deed, in order that it may be seen whether there was an authority for the act to the extent to which it is performed. But the same principle by which deeds may be admitted in evidence without proof of their execution may be applied to the power under which it purports to be executed. In either case the deed is *prima facie* evidence of title, if the possession of the premises

[1] *Clarkson* v. *Woodhouse*, 5 Tenn. R. 412.

purporting to have been granted has been taken and continued under the deed.[1]

In this connection it may be proper to mention the case of ancient boundaries in proof of which traditional evidence is sometimes admitted from the nature and necessity of the case, accordingly evidence of reputation, of boundaries, of parishes, towns, and the like, are received where they are of remote antiquity; but the weight of authority is against the admissibility

[1] 1 Starkie's Ev. 5 Am. Ed. 332, and the cases there collected. *Walder* v. *Tuttle*, 4 N. H. 371. *Tolman* v. *Emerson*, 4 Pick. 162.

Spencer, J. "The questions in this case are whether the will of Matthys Blanshaw was well proved, and whether Brachie, the wife of the lessor, alone took the share of Matthew, one of the children of the testator.

"It has been decided in this Court that a will stood upon the same footing as a deed, with respect to proof, and that an ancient will was subject to the same rule of evidence as an ancient deed. The will is dated 21st of April, 1770, but the testator did not die until 1780 or 1781. A will does not take effect until the testator's death; but it conveys only the lands of which he was seized when it was made, if the devise be ever so broad, and, therefore, though not consummated until the death of the devisor, it relates back to the time of the devise. The reason of the law in dispensing with the attendance of witnesses to a deed of thirty years' standing, and where possession has been held under it, is founded on the presumption that they are dead, and the impossibility of proving its execution, and though they are, in fact, alive, it is not necessary to produce them; for the rule is general in its operation. The reason of this rule applies to the time of the execution of a will and not to the death of the testator; for the same difficulty of proof exists in the one case as in the other. I think, therefore, that when wills and deeds have the same principle applied to them, as respects their proof, it is following the analogy to consider a will as an ancient one when thirty years have elapsed since its execution, and that it may be read in evidence where the possession has been held according to its provisions for twenty-seven years, as in the present case. If this be correct, the production of the will, the proof that all the children held under it, and had divided the estate according to the provisions, was sufficient proof *prima facie* of its execution. In the case of the *Governor and Company of the Chelsea Water Works* v. *Cowper*, 1 Esp. Cas. 275, Lord Kenyon admitted a bond to be given in evidence, saying that all deeds of above thirty years' date proved themselves, and that it added to its authenticity, coming from among the papers of the company, and being in the handwriting of their secretary; and a case is cited by Lord Kenyon where Lord Mansfield declared that he would admit a bond of above thirty years' standing, if proved to have been found among the papers of the deceased. The ancient rule required the lapse of sixty years before a deed proved itself; this rule has been narrowed to thirty years, and, as by our statute of limitation, the possession of land for twenty-five years gives a title against all the world, I consider a deed

of reputation in support of the boundary of a private estate, where such boundary is not identical with another of a public or *quasi* public nature.[1]

of more than thirty years' standing, and where possession has been held under it for twenty-five years, good evidence, without proving its execution." *Jackson* v. *Blansham*, 3 John. 294, 295.

[1] 1 Phillip Ev. 3 London Ed. 182.

Lord Kenyon, C. J. (after the argument), said: "The evidence given by the defendant of an usage of about seventy years is extremely strong in his favor, and the only evidence to weigh against it is that of the presentment signed by Robert Wood, but that is not necessarily inconsistent with it. The lord might have the general right, and yet a particular tenement have a prescriptive right also. On that ground, therefore, there is no ground for impeaching the verdict. With respect to the other question raised respecting the rejection of general evidence of reputation, it is involved in great dispute, and one is apt to imbibe prejudices from the opinion one has always heard inculcated. Upon the Oxford circuit which I went, such evidence was never received; and I can not help thinking that that practice is best supported by principle. Evidence of reputation upon general points is receivable, because all mankind being interested therein, it is natural to suppose that they may be conversant with the subjects, and that they should discourse together about them, having all the same means of information. But how can this apply to private titles, either with regard to particular customs or private prescriptions? How is it possible for strangers to know any thing of what concerns only these private titles? I barely, however, throw out these hints as the ground of my present opinion, laying in my claim to change that opinion, if I should hear any thing that shakes it." *Moorewood* v. *Wood*, 14 East, 328.

Buller, J., says: "I have already mentioned what has been the general practice on the Oxford and on the Western Circuit; and, as there are two judges from each of those circuits in Court, it is hardly likely for us to agree upon the general point. But thus far I agree with my lord and my brother Ashhurst, that in no case ought evidence of reputation to be received, except a foundation be first laid by other evidence of the right. Now here there was no foundation, or at least a very slight one in comparison to the evidence given by the defendant. But I can not agree that it ought not to be received at all. It was settled that it ought in the cases cited in argument, and also in many other instances, which relate merely to private titles, in one in particular as to whether such a piece of ground is parcel of one close or another. So again in the case of pedigrees. But as to this particular case the evidence is very strong with the defendant. It was not proved that the estate in question was in the possession of the defendant's grandfather at the time he signed the presentment, which was read in evidence, and even if that were made out, all the evidence since, for above sixty years, is the other way. The defendant's ancestors have all that time taken stone in defiance of the presentment and in the face of the lord himself, who was dared to bring an action for it. Now supposing all the evidence of reputation had been received, I think it ought to have weighed so slightly with the jury that the Court ought not to grant the new trial. For I

Recently it has been decided in England, upon the full consideration, that traditionary evidence respecting rights not of a public nature, is inadmissible.[1] Such evidence, however, has been admitted in support of private boundaries in several of the States.[2] In questions of boundary, the single declarations of a deceased individual as to a line or corner was admitted by the

do not know that because evidence which ought to have been received was rejected therefore the Court are bound to grant a new trial, if they see clearly that the verdict is right, notwithstanding such evidence had been admitted." 14 East, 329.

In *Nichols* v. *Parker*, Exeter Summer Assizes, 1805, upon a question of boundary between two parishes and manors, whether a certain common was within the parish and manor of Holne of which Sir Bouchier Wrey, Bart., was lord, or within the parish of Buckfastleigh and manor of Mainbow, of which Colonel Parker was lord, Le Blanc, J., admitted evidence of what old persons now dead had said concerning the boundaries of the parishes and manors, though not as to particular facts or transactions. And this, though these old persons were parishoners, and claimed rights of common of the wastes, which would be enlarged by their several declarations; there not appearing to be any dispute at the time respecting the right of the old persons making the declarations, at least no litigations pending (for in truth the boundary had been long in dispute between the respective parishes and manors; and intersecting perambulations had been made, both before and after such declarations by the respective parties), so that those persons could not be considered as having it in view to make evidence for themselves at the time; and in support of the same opinion were cited *The King* v. *The Inhabitants of Hammersmith*, sittings at Westminster after Hilary Term, 1776, before Lord Mansfield, C. J., and a case of *Down* v. *Hole*, at Taunton, in 1795, before Lawrence, J., in both which the same point had been ruled. 14 East, 330.

In *Clothier* v. *Chapman*, Bridgewater, Summer Assizes, 1805, where in replevin the question was whether Street Hill, *alias* Iveythrone Hill, a waste, was parcel of Iveythrone Farm and the soil and freehold of one Rooke or not, evidence was offered of declarations of old persons deceased, as to the ancient boundary of the waste belonging to Iveythrone Farm, that it extended to the inclosures on the north side of the hill and 2 *Roll. Abr.* 186 *pl.* 5 tit. *Prerogative* was cited in support of it; where it was held that such declarations as to whether certain land was parcel of a manor or of an estate were deemed admissible as between subjects, but not as against the Crown; and *Davies* v. *Pierce*, 2 Term. Rep. 53, was also cited. But Graham, B., rejected the evidence in this case where the question was not as to the boundary of a parish or manor, but between one person's private property and another. There was a verdict afterwards for the defendant by whom this evidence had been offered, so that the question could not be stirred again. 14 East, 330, 331.

[1] *Dunraven* v. *Llewellyn*, 15 A. D. & El. 791.

[2] *Kinney* v. *Farnsworth*, 17 Conn. 355–363; *Neiman* v. *Ward*, 1 Watts & Sarg. 68; *Tate* v. *Southard*, 1 Hawkes, 45.

court as of common reputation, the court saying, "whether this is within the spirit and reason of the rule it is now too late to inquire. It is the well established law of this State, and if the propriety of the rule was now *res integra*, perhaps the necessity of the case, arising from the situation of our country and the want of self-evident terminal points of our lands, would require its adoption, for it oftentimes leads to the establishment of truth.[1]

In South Carolina the declarations of a deceased surveyor with reference to the lines around a private estate, which he has originally surveyed, were held admissible.[2] But the question was ruled otherwise by the Supreme Court of the United States.[3]

[1] *Lasser* v. *Herring*, Dever. 340. [2] *Spears* v. *Coats*, 3 M'Cord, 227.

[3] The first question was upon the admissibility of the evidence of witnesses offered by the demandments to prove that one Moore, whose name was put down as one of the original chain carriers in making Remey's survey, was dead, and that he attended, with the witness, Camp Mullins, about twenty-four or twenty-five years ago, when one Charles Smith run from the mouth of Pond Creek to the White Oak Tree, and also run the line north from the mouth of Pond Creek; and while at the corner, and running the line, he declared that to be the corner made by Kincaid (the surveyor) and the lines run by Wilson by the direction of Kincaid for original survey; and also to prove what Moore had said to others relative to the boundary of Remey's patent and the making of the original survey since the settlement and possession of Pearl on the land in controversy. This evidence being objected to, was rejected by the Court, and this constitutes the matter of the first exception of the demandants.

We are of opinion that the evidence was properly rejected. It was not merely hearsay, but hearsay not to matters of general reputation or common interest among many, but to specific facts, namely, the manner and place of running the boundary lines of Remey's patent. The general rule is, that evidence to be admissible should be given under the sanction of an oath legally administered, and in a judicial proceeding, depending between the parties affected by it, or those who stand in privity of estate or interest with them. So it was laid down by Lord Kenyon in his able opinion in *The King* v. *Enswell*, 3 Term Rep. 721. Certain exceptions have, however, been allowed, which, perhaps, may be as old as the rule itself. But these exceptions stand upon peculiar grounds, and, as was remarked by Lord Ellenborough in *Weeks* v. *Sparke*, 1 M. & Sel. 686, the admission of hearsay evidence upon all occasions, whether in matters of public or private right, is somewhat of an anomaly. Hearsay is admitted in cases of pedigree, or prescriptive rights and customs, and some other cases of public or *quasi* public nature. In cases of pedigree it is admitted upon the ground of necessity, or the great difficulty, and sometimes the impossibility, of proving remote facts of this sort by living witnesses. But in these cases it is only admitted when the tradition comes from persons intimately connected, or in close relation with, the family, or from sources of a kindred nature, which.

CHAPTER X.

MATTERS OF PUBLIC AND GENERAL INTEREST.

A FOURTH exception to the rule excluding hearsay evidence arises in matters of public and general interest. In such matters all persons are presumed to be conversant, just as the law presumes individuals to be conversant with their own private affairs. Individuals talk of their private rights; so common rights are usually talked of by the public; and what is there stated in conversation may, *prima facie*, be regarded as true, especially where it is in accordance with the current of assertion.[1]

in a general sense, may be said to import verity, there being no *lis mota* or other interest to affect the credit of their statement. So the law was expounded by Lord Kenyon in *The King* v. *Enswell*, 3 Term Rep. 723; and by Lord Eldon in *Vowles* v. *Young*, 13 Ves. 143; and in *Whitlocke* v. *Baker*, 13 Ves. 514; *Ellicott* v. *Pearl*. 12 Curtis, 181.

[1] Lord Ellenborough, Chief-Justice, says: "Notwithstanding the practice may have prevailed for a long time to receive ships' registers as evidence without more of the property being in the persons named therein, yet when we are brought to consider the admissibility of such evidence against the defendant in a case where he has done no act to adopt the register as having been made by his authority, we can not give effect to it without saying that a party may have a burthensome charge thrown upon him by the act of a third person without his own assent or privity. If it had appeared that the defendant had by any act of his own recognized the register, he would have been liable to all the consequences as a part owner, which it describes him to be; but here he has done no act to adopt. His partner, Clarke, has indeed dealt with the property as if the defendant were a part owner by registering the ship in his name, but the act of a third person, without the act of the defendant to recognize it, can not throw upon him a burthen without violating the plain rule of law. The case of enrolments stands upon a particular statute. The stat. 10 Ann. c. 18 s. 3, provides that copies of the enrolment of indentures of bargain and sale, examined with the enrolment, and signed by the proper officer and proved upon oath, shall have the same force and effect as the original indentures. But the register acts have not attributed to the registers the same effect as if the persons therein named were proved to be owners. Therefore, reserving my opinion in what respects such registers may be evidence, whether available for certain public purposes which the legislature had in view in requiring such registers, or what conclusions may be drawn from them if adopted by the parties therein named, I can not say, in this case, that without any evidence of such adoption by the defendant, he can be charged as owner upon the mere proof of the register naming him as such." *Tinkler* v. *Walpole*, 14 East, 230–232.

By the Roman law, reputation or common fame seems to have been admissible in evidence in all cases, but it was not generally deemed sufficient proof unless corroborated. It was, however, held sufficient *plena probatio* wherever, from the nature of the case, better evidence was not obtainable.[1] In matters in which all are concerned, reputation from any one appears to be receivable; but its value is dependent upon the means of knowledge of the declarant. Where the fact in controversy is one in which all the members of the community are not interested, but only those who live in a particular district, declarations of persons having no interest and living outside of the district, are not admissible. In order to the admission of this species of hearsay evidence it is necessary that it should be confined to cases of ancient rights and to the declarations of persons supposed to be dead.

In order to the admission of this class of evidence, it is necessary that the origin of the rights in question should antedate the time of legal memory. It is usually held to be twenty-one years, and to be incapable of direct proof by living witnesses. It was formerly considered necessary, in order to the reception of hearsay evidence in matters of general interest, that a foundation should be laid, by proof of enjoyment within living memory; but this doctrine has since been overruled, and it is now only material as giving weight to the evidence in the case of a private right. Evidence of reputation has sometimes been admitted in confirmation of actual enjoyment. It is, however, allowed in support of the right, but never against it.[2] The

Le Blanc, Judge, says: "These registers were not produced in evidence for any public purpose within the view of the registry acts, but between private persons and for private purposes; and what is now contended is, that those acts having required these registers to be made for certain purposes, they shall be received as evidence for every purpose; but I can not adopt the argument to that extent. For every purpose that the statutes have required these public documents to be made, they are evidence by force of the statutes; but when produced for any other purpose, they are stripped of legislative authority, and must be evidence or not, according to the general principle of evidence. In this case, therefore, the registers having been made by third persons, can not be evidence against the defendant without proof of their having been acknowledged by him." 14 East, 232.

Wicks v. *Spark*, 1 M. & S., 686; *Berkeley Peerage Case*, 4 Camp. 416.

[1] 1 Cowel, 411.

[2] *White* v. *Lisle*, 4 Mad. R. 214–225.

ground on which such evidence proceeds is, that the declarations are made by a party who knows the truth and who is without any temptation to misrepresent it. And this introduces another important qualification; that is, that the declaration offered in evidence must be made before any controversy had arisen, or, as it is ordinarily expressed, *ante litem motam*, for no man is presumed by the law to be indifferent with reference to matters in actual controversy; for when a matter in controversy arises, people usually take sides. To avoid the mischief which would otherwise result under such circumstances, all *ex parte* declarations, made subsequent to the beginning of the controversy, are therefore excluded.

The term controversy should be understood not as the commencement of the suit, but as the commencement of the disagreement. Declarations made after commencement of the controversy are not receivable, though it be shown that the existence of the controversy is or was not known to the declarant. The declarant's ignorance or knowledge of the fact would involve the investigation of a collateral fact, which courts will not entertain. Before declarations are admissible, the declarant must either be absent or dead; and it is obvious that it would be opening the door wide and tend to confuse the decision of the main point in issue, if proof on both sides were admitted of the knowledge of a controversy.[1]

A want of competent knowledge in the declarant is generally regarded as sufficient cause for rejecting the evidence of reputation in matters of mere private right; but such evidence is receivable upon matters of a public or *quasi* public nature, for the reason assigned by Lord Kenyon, "That all mankind were interested therein, and it is natural to suppose that they are conversant with the subjects, and that they should discourse together about them, having all the same means of information." It is obvious, however, that this reason does not apply to private titles or private prescriptions, or to particular customs. It has sometimes been claimed that the case of prescriptive right constituted an exception; but it will be found where evidence of reputation has been admitted in such cases, the right was one in which the

[1] *Berkeley Peerage Case*, 4 Campb. 417.

public had all along with the private individual been equally interested.[1] The general rule is that evidence to be admissible should be given under the sanction of an oath legally administered, and in a judicial proceeding pending between the parties affected by it.[2] Certain exceptions have, however, been allowed which perhaps may be as old as the rule itself, but these exceptions stand upon peculiar grounds. "The admission," said Lord Ellenborough, "of hearsay evidence upon all occasions, whether in matters of public or private right, is somewhat of an anomaly.[3] Hearsay evidence is admitted in cases of pedigree, or prescriptive rights and customs, and some other cases of public or *quasi* public nature. In cases of pedigree it is admitted upon the ground of necessity, of great difficulty, and sometimes the impossibility of proving remote facts of this sort by living witnesses; but in these cases it is only admitted when the tradition comes from persons intimately connected or in close relation with the family, or from sources of a kindred nature, which in a general sense may be said to import verity, there being no *lis mota* or

[1] 1 Starkie's Ev. 30; *Reed* v. *Jackson*, 1 East, 357.

[2] *King* v. *Enswell*, 3 Term. R. 721.

[3] The next exception is founded upon the refusal of the Court to permit testimony to be given of the declarations of one Kincaid, the surveyors of Remey's survey, under the following circumstances: Kincaid had been examined as a witness for the demandants (by way of deposition), and the tenants thereupon gave in evidence the conversations and declarations of Kincaid to certain witnesses in order to discredit his (Kincaid's) testimony, and to show that he had stated that the survey was made by him at the mouth of Raccoon Creek for Remey, when it was his interest to place it at Pond Creek. The demandants then, with a view to sustain Kincaid and to support the statements going to his interest offered witnesses to prove the statements and conversations of Kincaid at other times, corresponding with the statements made in his deposition, relative to his making the surveys of Thompson and Remey, and it being suggested by the demandants upon an inquiry from the Court, these statements and conversations were subsequent to those testified to by the tenants' witnesses; the Court, upon an objection taken by the tenants, excluded the evidence. In our opinion the evidence was rightly excluded.

Where witness's proof has been offered against the testimony of a witness under oath, in order to impeach his veracity, establishing that he has given a different account at another time, we are of opinion that in general evidence is not admissible in order to confirm his testimony, to prove that at other times he has given the same account as he has under oath; for it is but his mere declaration of the fact and that is not evidence. His testimony under oath is better evidence than his confirmatory declarations not under oath, and the repetition

other interest to affect the credit of their statements.[1]" Another distinction obtains between general points and particular facts of a private nature. The former is received, as we have before shown, but the latter is rejected; but where the particular fact is proven *aliunde* evidence of general reputation is sometimes received to explain or to qualify it. Thus, where the question was whether a turnpike was situated within the limits of a certain town, it was held that evidence was admissible of general reputation to show that the boundary of the town extended to a certain close, but not that formerly there were houses where none then stood, that being a particular fact in which the public had no interest. The question of admissibility of this sort of evidence turns upon the nature of the fact whether it was of a public or private interest.[2] Where particular knowledge of a fact is sought to be brought home to a party, evidence of the general reputation and belief of that fact among his neighbors is admissible, as tending to show that he also had knowledge of it.[3]

The principles applicable to this class of evidence obviously includes documentary evidence, as well as oral declarations. If the matters in controversy are not susceptible of better evidence, and it is ancient and of public and general interest, any proof, in the nature of traditionary declarations, is receivable, whether written or oral; thus deeds, leases, and other private documents are admitted in evidence as declaratory of public matters recited in them;[4] on the same principle also, maps and verdicts, are receivable in questions of public interest.[5] Thus upon a question of boundary between two farms, it being proved that the boundary of one of them was identical with that of a hamlet,

of his assertions does not carry his credibility further, if so far as his oath. We say in general, because there are exceptions, but they are of a peculiar nature, not applicable to the circumstances of the present case, as where the testimony is assailed as a fabrication of a recent date, or a complaint recently made, for there, in order to repel such imputation, proof of the antecedent declaration of the party may be admitted. *Ellicott* v. *Pearl*, 12 Curtis, 185–186.

[1] *Bowles* v. *Young*, 13 Ves. 143; *Whitlock* v. *Baker*, 13 Ves. 514; *Wicks* v. *Spark*, 1 M. & S. 686.

[2] 1 Starkie's Ev. 34.

[3] *Brander* v. *Ferridy*, 16 Louis, R. 296.

[4] *Clarkson* v. *Woodhouse*, 5 Tenn. 412, 3 Doug. 189; *Taylor* v. *Cook & Price*, 650.

[5] 1 Phillips's Ev. 250; *Noyes* v. *White*, 19 Cal. 250.

evidence of reputation as to the bounds of the hamlet was held admissible.[1] But an old map of a parish produced from the parish chest, and which was made under a private inclosure act, was held inadmissible evidence of boundary without proof of the inclosure act.[2]

CHAPTER XI.

THE TESTIMONY OF DECEASED WITNESSES ON A FORMER TRIAL.

THE former testimony of a deceased witness is admissible in another trial of the same cause; nor is it necessary that the former testimony should have been given on the trial of a cause in the exact technical signification of the term. It is enough that the point was investigated in a judicial proceeding of any kind wherein the party to be affected by the testimony had the privilege of cross-examining the deceased witness; thus it was held that what a witness testified before commissioners appointed by a statute to settle the title to lands, or before the trustees of an absconed debtor, or before commissioners legally appointed to examine into the affairs of an estate, represented insolvent, is admissible in evidence.[3] The same doctrine has recently been

[1] *Thomas* v. *Jenkins*, 1 N. & P. 588. [2] *Reg* v. *Milton*, 1 C. & K. 58.

[3] Thompson, J., said: "It seems to be well settled, and indeed is not denied by the plaintiff's counsel, that where a person who gave evidence on a former trial between the same parties in the usual and ordinary course of proceeding in courts of justice be dead, upon due proof of such trial, and the death of the witness, it is competent to prove what such witness had formerly sworn. 1 Strange, 162; 3 Burr. 1255; 2 Lord Raym. 1166; 2 P. Wms. 563; 2 Shower, 47; Lil. Ab. 765). But it is said that this rule ought not to be extended to testimony taken before the Onondaga commissioners. I am unable, however, to discover any substantial reason for the distinction. These commissioners were duly constituted a tribunal to hear and determine disputes relative to the very land in question, and to administer an oath to witnesses. Opportunity was given for cross-examining witnesses; and it appears that the title now in question was actually litigated before the commissioners. I understand it to be admitted by the case that a trial was pending at the time the witnesses were sworn, and that no objection was made respecting the mode of proving that such trial was pending. The objection only went to the admissibility of proof as to what the witness had sworn. What a deceased witness testified on a former trial is only to be ascertained by the testimony of some person present, who was under circumstances to know and remember his evidence, no records being kept of what witnesses swear in courts of law. This species of evidence is admitted *ex neces*

applied to a proceeding and testimony of a deceased witness[1] on a *caveat* against the proof of a will in the register's court.[2]

But the admission of such testimony in some of the cases has been carefully restricted and confined to civil cases, and the evidence of what a deceased witness testified on a former trial was held not admissible in a criminal cause, whether it relates to a felony or a mere misdemeanor.[3] Such evidence was said by the judges in England to violate a clause in the *Magna Charta* demanding that the accused should be confronted with the witnesses. This doctrine, however, that the testimony of a deceased witness is not admissible in criminal cases has been questioned, and it has been contended that the general rules of evidence are the same both in civil and criminal cases, except in the latter the

sitate, and must be left to the sound discretion of a jury, under the direction of the Court to give it such weight as it merits. The general rule is, that when any matter sworn at a former trial is given in evidence it must be between the same parties, otherwise no opportunity would be given for cross-examining the witness. The present case falls strictly within this rule. But even the want of an opportunity for cross-examination has not been deemed sufficient to exclude this kind of evidence. For it has been ruled that if witnesses who were examined on a coroner's inquest be dead or beyond the sea, their depositions may be read, for the coroner is an officer, on behalf of the public, to make inquiry about the matters within his jurisdiction, and, therefore, the law will presume the depositions before him to be fairly and impartially taken. (1 Lev. 180; Buller, N. P. 242.) My opinion, therefore, is, that the testimony offered was competent, and ought to have been received, and that a new trial must be awarded, with costs, to abide the event. 2 John. 19, 20; *Fitch* v. *Hyde;* Kirby, 258; *Forney* v. *Gallagher*, 11 Serg. & Rawle, 203).

[1] *Per Curiam.* The deposition of Joseph Sears was taken on the 16th of August, 1809, and when it was offered to be read before the referees in December, 1809, he was dead. This deposition was taken by the trustees when Sears was examined by them on the claim of Cox, and the Statute says (Laws, Vol. i, p. 240), "That the trustees, or any two of them, are competent to settle all matters and accounts between the debtor and his creditors, and to examine any person on oath concerning the same, which oath may be administered by any of said trustees, two of them being present." In this examination the trustees act as the official agents of both parties, and under obligations, official and religious, to act impartially. A deposition taken before them when they were examining the witnesses ought to be read afterwards upon the death of the witness, as much as a deposition taken before a coroner's inquest or the Onondaga commissioners, and it ought equally to be admitted. 7 John. 298.

[2] *Ollinger* v. *Ollinger*, 17 Serg. & Rawle, 142; *Ray* v. *Bush*, 1 Root, 81.

[3] *State* v. *Atkins*, 1 Term (by Overton) 229; *Finn* v. *The Commonwealth*, 5 Rand. 701–708.

law allows greater latitude than the former by receiving the declarations of a party *in extremis;* and as to the constitutional objection, that the accuser and the accused should be brought face to face, it is said that this is done by having the deceased witness on the former trial face to face with the accused, and the witness who details the statement face to face with the accused.[1] But it seems to us that the object of the constitutional provision before referred to is not satisfied short of the presence of the witness in a criminal case before the court and jury, or other tribunal, that is to try the accused, so that they may be able to observe the bearing of the witness upon the witness-stand, his manner, his degree of intelligence, and all the circumstances which might tend to affect his testimony. The cases all agree that in order to the admission of the testimony of a deceased witness on a former trial or investigation, the parties must be the same,[2] or at least they must be in privity. Where the parties

[1] 1 M'Naly, 390; *United States* v. *Wood*, 3. Wash. C. C. R. 440.

The admission of the testimony at the circuit was put on the ground that the defendants, by introducing the witness on the former trial, had declared his competency and credibility, and thereby precluded themselves from questioning either. This was undoubtedly true so far as that trial was concerned (1 Phil. Ev. 213), but no farther. Independently of that trial, Shearer was not the witness of the defendants, unless they again choose to make him such. Had he been living, and been introduced by the plaintiff on the second trial, it could not, for a moment, be contended that the defendants were not at liberty to take any exceptions to his testimony; and yet, the argument would seem to be pushed to this extent. I am aware a distinction is taken between a living witness and the testimony of one deceased; but I have already endeavored to give the answer to it in this particular case. The position of a cause at the circuit sometimes makes it expedient, in a choice of evils, for a party to risk the testimony of a witness interested against him, and as to that trial he must abide the consequences; but if the experiment has proved that the choice was an unwise one, it would be a hard measure of justice to say the witness should ever after be not only a competent but a credible witness in the cause for his adversary, whether dead or alive. The decease of Shearer may be a misfortune to the plaintiff, but that is no reason for throwing that misfortune on the defendants; nor is the fact that plaintiff has once had the benefit of the testimony of an interested witness a reason why it should be repeated. There is no force in the position that a party who has used a witness interested against him should afterwards, on a second trial, be estopped from excepting to him on the ground that he is practicing a fraud upon the court. The rule of evidence here alluded to has no application to the case. 12 Wendell, 46.

[2] The rule as to admitting what a witness swore upon a former trial, is supposed to be this: That to render such testimony admissible, it must be between

were the same, with the addition of one defendant, on the second trial the testimony was held inadmissible; the same ruling was

the same parties and the point in issue the same, and the words of the witness must be given—not what is supposed to be the substance of his testimony. The witness must also be dead (1 Phil. Ev. 215; Bull. N. P. 243; 4 T. R. 290; 14 Mass. Rep. 234; 4 Serg. & Rawle's Rep. 203); 6 Cowen, 163.

The Court refused to suffer him to be examined. *United States* v. *Wood*, 3 Wash. C. C. Rep. 440. But in *Pegram* v. *Isabell*, 2 Hen. & Munf. 193, the substance of what a deceased witness said was proved and received without objection. In a subsequent Virginia case this is shown not to be a departure from Lord Kenyon's meaning. It was here objected that a juror must give the very words of the deceased witness, not the *substance* of them. The objection was overruled. On appeal, this decision was affirmed by all the judges present.

A witness may use his notes to refresh his memory, and then he must swear from recollection, independent of his notes (*Lightner* v. *Wicke*, 4 Serg. & Rawle, 203, 205, 206). Also the whole of the substance of what the deceased witness testified to must be given—not a part. *Wolf* v. *Wyeth* (11 Serg. & Rawle, 149, 150, 151). Where the witness could not recollect the exact words, but could give the substance, remembered there was a cross-examination but not the questions put, but thought he could recollect some of them if reminded by questions. Held inadmissible. The Court say they do not require the very words, as is done in England, but allow the substance to be given: but in this there must be no equivocation or ambiguity. *Watson* v. *Gilday*, 11 Serg. & Rawle, 337, 338, 342.

In the case of *Cornell* v. *Green*, 10 Serg. & Rawle, 16, 17, one Fisher, counsel for the plaintiff, was offered to prove what a deceased witness swore to on a former trial. He said from having been consulted before the suit was instituted, and directing what was to be done, and from what the deceased witness swore was done; from having frequently recurred to his notes, and from conversation with him before the trial, he had a perfect recollection of what he swore. He was in the habit of taking down the very words of the witness, not the substance, and he believed his notes contained every word. Without his notes he would not undertake to state every word, but could state the material part without his notes. He was permitted to testify. On error upon this point the Court said, by Gibson, judge, they could not see any reason in the rule stated in Phillips, that the witness must undertake to repeat his very words. The rule, applied in that degree of strictness, would be useless in practice; for there is no man, be his powers of recollection what they may, who could, in one case picked out of ten thousand, be qualified to give such evidence; and if he should positively undertake to swear to the very words, the jury ought, on that account, to disbelieve him. The reason assigned that the jury and not the witness is to judge of the effect, is more plausible than sound. The truth is, that evidence of what a deceased witness said being inferior in its nature to a personal examination, is admissible on the ground that better evidence does not remain, the jury being left to form their own judgment of the accuracy of the narration. I can not see why the same necessity which opens the way for secondary evidence of the words of a deceased witness should not open the way, also, for the substance of his

made where additional parties plaintiff were added in the second suit.[1] The doctrine of these cases is very strict, for in both the testimony offered was to prove what a witness swore against the parties who were before the court on the former trial, with every facility for cross-examination. The objection rested on the simple ground that the parties offering the testimony were the only parties who had been added. The point of difference in the former and in the latter case was also the same, and the parties who had a substantial ground of objection were willing to waive the objection to their want of opportunity for cross-examination in the former suit. Notwithstanding the great weight that the opinions of these Courts are justly entitled to, we think that they have unnecessarily tied up the receipt of this kind of evidence to a greater degree of strictness than appears to be required in respect of verdicts and judgments.[2]

This character of testimony is admissible, not only against the party in the former cause, but against those who are privy to him either in estate, in blood, or in law, and especially where they claim under him by a title derived since the former trial or examination.[3] But where two persons now claim separate par-

testimony when his very words can not be recollected, or discover the policy of a rule which should shut out the little light that is left when it is all that is left, merely because it may not be sufficient to remove every thing like obscurity. *Cornell* v. *Green*, 10 Serg. & Rawle, 16, 17.

In Pennsylvania, the narrow construction of Lord Kenyon's rule, if it ever prevailed, maintained but a short ascendancy. Phil. Ev. Cowen & Hill's Notes, 1, 333.

Where a person stated he had intended to take down the words of the witness and all that he deemed material, but could not say that he had taken his precise words or every word of the testimony, and that he could not swear to the testimony except from his minutes, held that such evidence was admissible. *Clark* v. *Vorce*, 15 Wend. 193. If nothing will answer but an exact transcript of the witness in his very words, and all his words, it will exclude all such testimony. 6 Cowen, 163, 164.

[1] *Boardman* v. *Reed's Lessees*, 6 Peters, 328; *Boubereau* v. *Montgomery*, 4 Wash. C. C. R. 186.

[2] *Lawrence* v. *Hunt*, 10 Wend. 80.

[3] If the verdict in the former ejectment was admissible on the trial of this suit by reason that the tenant for life and the remainder men are privies in estate, it follows that the evidence given in the first suit by a deceased witness is also admissible. The rule is, that such evidence is proper, not only when the point in issue is the same in a subsequent suit between the same parties, but

cels of land, both of which were once owned by a person from whom the two separately derived title, it was held that what a deceased witness once swore upon a separate ejectment against one is not evidence against the other, for there was no privity of estate between them in respect to such evidence.[1] The privity that will admit the introduction of this character of evidence may be defined to be the mutual or successive relationship to the same right of property.

It was formerly held that the witness called to prove the statement testified to by a deceased witness on a former trial, must undertake to give his precise words,[2] and the testimony,

also for or against persons standing in the relation of privies in blood, privies in estate, or privies in law. 15 John. 543.

[1] *Jackson, ex dem.* v. *Crissey*, 3 Wend. 251.

[2] Putnam, Judge, delivered the opinion of the Court. The question is whether the testimony of Messrs. Adams and Keith, of what S. Hopkins swore to before the magistrate upon the examination of the defendant on the charge of perjury, is competent evidence. It has been contended for the defendant that the admission of such evidence is directly against the twelfth article of the bill of rights, which provides that in criminal cases the subject shall have a right "to *meet the witness against him face to face.*"

Now, the defendant did meet the witness, who has deceased, face to face, and might have cross-examined him before the magistrate touching this accusation. Was it competent for the witnesses, who testified at the trial in the Court of Common Pleas in the presence of the prisoner, to state what Hopkins, who is now deceased, did swear to before the magistrate in the presence of the prisoner? We do not think that the case falls within the constitutional objection. That provision was made to exclude any evidence by deposition which could be given orally in the presence of the accused; but was not intended to affect the question as to what was or was not competent evidence to be given face to face according to the settled rules of the common law. In trials for murder, for example, the dying declarations of the party as to the fact of having received the death wound from the party accused, and the circumstances attending, have been proved by persons who were present and heard and could make oath to such declarations. They are not considered as hearsay evidence, for, being made under the apprehension of immediate death, they are justly supposed to be entitled to all the credit which would be given to them if the declarant made them on oath. Such declarations, made when the accused was not present, are admissible in evidence (Peake's Evid. 60; *Rex* v. *Radbourne*, Leach, 512), and were not intended to be excluded or touched by the provisions cited from the bill of rights.

We think it to be very clear, that testimony of what a deceased witness did testify on a former trial between the same parties, on the same issue, is competent evidence. The rule is thus well stated in 2 Lilly's Abr. 745: "If one who

merely, to that effect, was inadmissible. This degree of strictness is not now adhered to. A distinction, in some cases, has been drawn between giving the substance of the deceased witness's

gave evidence on a former trial be dead, then upon proof of his death, any person who heard him give evidence and observed it, shall be admitted to give *the same evidence* as the deceased witness gave; provided it were between the same parties." I cite the passage for the expression, "shall be permitted to give the *same evidence*" which the deceased gave. It is to be the same—not a part, not the effect or substance, but the whole evidence which the deceased gave touching the matter or issue in controversy. 1 Phil. Evid. c. 7, § 7; *Miles* v. *O'Hara*, 4 Binney 111; *Pyke* v. *Crouch*, 1 Ld. Raym. 730; *Melvin* v. *Whiting*, 7 Pick. 79; Bull. N. P. 242, *et seq.* In *Finn* v. *Comwonwealth*, 5 Randolph, 708, the Court confined this rule of evidence to *civil* causes; "we can not find the rule has ever been allowed in a *criminal case*." But the rules of evidence in civil and in criminal cases are generally the same, and this rule was recognized in the information against *Buckworth* (T. Raymond, 170), for perjury in a case of ejectment. The defendants pleaded not guilty, and to prove the perjury a witness was produced to prove what one who had since died swore upon the first trial. Keyling, Chief-Justice, would not allow it because the former trial was betwixt other parties. Twisden and Morton, contra, and it was allowed. Now, Keyling did not contend that such evidence was not competent if it were between the same parties. *Vid.* S. C. 1 Sid. 377, where the particular evidence given by the defendant is set forth.

It is stated in Gilb. Evid. 889, that exceptions to the rules as to hearsay evidence applicable to ancient customs do not apply to criminal cases; but in the case of the *United States* v. *Wood*, 3 Wash. C. C. R. 440, for robbing the mail, such evidence is held to be admissible. Bache was allowed to testify what Hare swore to at a former trial, but he could not do it. He could swear to what he thought was the substance and effect of it. He was allowed to refresh his recollection by reference to the minutes which he had taken at the time, but he was rejected because he could not say that he recollected the words of Hare, although he felt the most entire confidence that he had taken them as the witness uttered them. Now this was right; for unless he could give the words, how can it be said to be the same evidence that the deceased witness gave? It is the mere inference, but the jury should draw the inference from the words which the deceased witness used. So in *Rex* v. *Jolliffe*, 4 T. R. 290, a witness was called to prove what Lord Palmerston had sworn to at a former trial, and was rejected because he would not undertake to give the very words, but merely their effect or substance. But the whole of what the deceased witness said should be proved. Some part of which was said and not recollected might certainly limit and qualify the meaning of the words which are recollected. Hence it is that persons who are in hearing, who are favorably inclined to one party, may recollect a particular expression which conformed to their wishes, and wholly omit the words of qualification, while others, who inclined towards the other side, will remember the words of qualification and forget or take no notice of the particular expression. We see this exemplified very frequently in trials before juries. How com-

language and the substance of his testimony, holding that it is sufficient if the witness is able to state the language of the deceased witness substantially and in all material particulars. The distinction between the substance of the language and the substance of the testimony is certainly shadowy, and to hold that the witness must give the precise words used by the deceased witness is, in effect, to exclude this character of evidence altogether; for

mon it is for the counsel engaged in the cause to disagree as to what the witness has sworn to recently. One notes down upon paper or treasures up in his mind what he considers to be favorable and disregards the rest, while the other recollects the rest with great clearness. And it is not unusual that the Court understood the witness to state the matter differently from what the counsel on either side suppose was the evidence. The difficulty is increased by the length of time which has elapsed between the time when the testimony of the deceased witness was given and the statement of it by the living witness who heard it. To be worth any thing, the whole of what the deceased witness said upon the matter should be stated, and if you get the whole it is very defective, for you can not have a true representation of the countenance, manner, and expression of the deceased witness, which either confirmed or denied the truth of the testimony. The false witness can not endure the stings of his wounded conscience; his countenance and his deportment will, in spite of his endeavors to the contrary, by signs as clear and intelligible as they are inexpressible, declare that the story which he has just sworn to is a lie.

These considerations induce us to require full proof of all that the deceased witness swore to. His words, and not the synonymous words of him who states his testimony, are to be recited. In *Wilbur* v. *Selwin*, 6 Cowen, 162, the Court held that the words of the deceased witness should be given, and not the substance of them. It is true that this strictness will generally exclude such testimony; for if the evidence of a deceased witness was minute and protracted, and related to a transaction which was of a complicated character, it would seem to be almost incredible that any person could, with certainty, recite it. If he undertook to do it, it is very likely he would lose as much in credit as he should assume in positiveness. If the evidence related to a single fact—for example, whether the witness did or did not see A. B. sign such a note—the answer might well be recollected.

To apply this reasoning and the authorities which are cited at the bar to the case under consideration, we think it to be very clear that there was not legal and sufficient evidence given by Mr. Adams or by Mr. Keith of what Hopkins, the deceased witness, swore to. They say they can not give the exact words, but their substance from recollection, aided by notes of his testimony taken at the trial. And this sort of evidence was rejected by the Circuit Court of the United States in the case of the *United States* v. *Wood*, before cited. The case at bar is not certainly more favorable for the government than that was. The result follows that the verdict must be set aside and a new trial be had at the bar of the Court of Common Pleas for this county. 18 Pick. 436.

no honest witness would venture to detail the testimony given by a deceased witness on a former trial if he was compelled to state it in the exact language of the witness. The infirmity of the human memory would not justify any such an assumption, and it is now well settled that the substance of what a witness testified on a former trial, even in proof of the crime of perjury, is sufficient.[1]

From what we have already said it is apparent that to entitle a party to give evidence of the testimony of a deceased witness on a former trial, it must be shown by ancillary proof that the witness is dead,[2] and it is not sufficient that he be absent in an-

[1] *Rex* v. *Rowley*, 1 Mood. Cr. Cases, 111; *Cornell* v. *Green*, 10 Serg. & Rawle, 14–16; *Miles* v. *O'Hara*, 4 Binn. 108; 2 Russ. on Crimes, 3d. Am. Ed. 638–683; *Sloane* v. *Sumner*, 1 Spencer R. 66; *Garrett* v. *Johnson*, 11 Gill. & John. 28; *Van Buren* v. *Cochburn*, 14 Barb. 118; *Jones* v. *Wood*, 16 Penn. St. 25; *Davis* v. *The State*, 17 Ala. 354.

[2] What one swore on a former trial can not be given in evidence, unless he be dead. That he is beyond the reach of process of subpœna, and can not be found on diligent inquiry will not render such proof admissible. *Wilbur* v. *Selden*, 6 Cowen, 162.

Spencer, C. J., delivered the opinion of the Court, and said: "The material points in the cause are, Whether the note in question was fraudulently put into circulation? Whether the plaintiffs are *bona fide* holders of it? And whether the confession of one of the plaintiffs, that the note was usuriously discounted, was admissible in evidence? There is no force in the objections, that the indulgence, granted by the plaintiffs to Wood, discharged the defendant, or as to the overruling the proof of what a witness had sworn on a former trial, as to usury in the transaction. It is decisive as to these points, that mere delay to sue does not affect the rights of the creditor, even against a surety; and that to entitle a party to give in evidence the testimony of a witness on a former trial, it must be shown that the witness is dead; and this was not shown or pretended.

"The note in question was the renewal of one which had been drawn by Wood, and indorsed by the defendant. The first note was intended to be discounted at the Newburg Bank, but was discounted by the plaintiffs; and it appeared by the testimony of Smith, an indorser of the note subsequent to the defendant's indorsement, that the present was delivered to him by Wood, indorsed by the defendant without any directions or instructions from either in what manner he was to negotiate it, though it was well understood by Wood and the defendant that with the avails he was to take up the original note. Independently of the question of usury there is nothing in the objection; the first note was made and indorsed to raise money on, and it was entirely immaterial whether it was discounted at Bank of Newburg or elsewhere. It did not alter or increase the responsibility of the indorser; the money to be raised was intended to be for the benefit of Wood, and he did receive the money for which

other State, although some of the authorities hold that evidence of this character may be given where the witness is dead, insane, or beyond sea, and where he has been kept away by the con-

the first note was discounted. If the plaintiffs knew when they received the note that it was intended to be discounted at the Bank of Newburg, and had been refused, it would not affect them or establish any fraud.

"Smith, the second indorser of the note, and the person who had procured the plaintiffs to discount the first note, and had negotiated the note in question to them to take up the first note, was asked whether Jacob Powell, one of the plaintiffs, had not since the note was discounted admitted to him that it was usuriously discounted. This question was objected to by the plaintiff's counsel and overruled.

"The situation in which Smith stood did not incapacitate him from testifying to that fact. He was not asked any question involving his own turpitude, as whether the note which he passed as a good and available note was void within his knowledge, when he offered it to the plaintiffs; and that I consider to be the precise point on which a majority of this Court, in *Winton* v. *Saidler*, 3 John's. Cas. 185, rejected the testimony of an indorser. The reasoning of Mr. Justice Thompson, who delivered an opinion on that side of the question, proceeds on the maxim that *nemo allegans suam turpitudinem est audiendus;* he considered it as contrary to sound policy and morality that a party to a negotiable note should be admitted as a witness to invalidate it; meaning, undoubtedly, to be understood that a person whose name was on a negotiable paper, and who had thereby contributed to its circulation, should not be heard to say that the paper thus sanctioned by his name was tainted when it passed from his hands. But, if it receives its taint when it is negotiated to the party plaintiff by the facts then happening, it is not contrary to public policy or morality; nor would it come within the principle of the decision of Winton and Saidler to hear the witness as to such facts if there were no other objections to his testifying. If the plaintiffs discounted the first note upon a usurious consideration, and the note in question was a mere substitute for that note, they are not entitled to object to the evidence that they themselves were guilty of usury, because Smith, whose name was on the note, was the agent of Wood in making the usurious bargain. The principle in Winton and Saidler was intended as a protection for the fair and *bona fide* holders of a negotiable note or bill against any prior transaction which had already invalidated the paper so far as regarded any person who had, by indorsing the paper, or putting his name to it as a party from being a witness to impeach it. The case of *Skelding* v. *Warren*, 15 Johns. Rep. 275, is in point to show that a party whose name is on a negotiable paper, may be permitted to testify as to any facts which arise subsequent to the signature of the witness. Upon authority, then, Smith was a good witness to prove the usury by the plaintiffs in their acquisition of the note.

"It may, however, be urged that the purchase of the note by the plaintiffs at such a discount as would amount to usury in case the note was originally intended to be sold to them, is not under the circumstances usurious, and in face that it was the mere purchase of the note at a less sum than its face. The cast

trivance of the other party.[1] Where the witness has gone, and his place of residence can not be ascertained by diligent inquiry, it would seem that his former testimony ought to be admitted. If he is merely out of the jurisdiction of the Court, and his residence is known, and his testimony can be obtained on a *dedimus* or commission, what he testified on a former trial ought not to be received.

CHAPTER XII.

DECLARATIONS OF AGENTS.

ANOTHER apparent exception to the rule excluding hearsay declarations arises in regard to the declarations and admissions of agents. It can hardly be so regarded, however, where the principal constitutes the agent his representative in the transaction of business. What the agent does in the lawful prosecution of that business, and within the scope of his authority, is in

of *Munn* v. *The Commission Company*, 15 Johns. Rep. 55, settles this point. It is there said that if a bill or note be made for the purpose of raising money and it is discounted at a higher premium than the legal rate of interest, and none of the parties whose names are on it can, as between themselves, maintain a suit on the bill, when it becomes mature, provided it had not been discounted, that then such discounting the bill would be usurious, and the bill would be void. In the present case the note was indorsed for the accommodation of Wood, and it was not an available paper in the hands of either the payer or indorser until it had been negotiated to the plaintiffs, and the transaction, therefore, would be usurious if the plaintiffs purchased the note at a less sum than its nominal amount, deducting the interest for the time the note had to run.

"It certainly was an extraordinary question which was put to the witness, whether one of the plaintiffs had not admitted to him since the note was discounted that it was usuriously discounted; for Smith being the person who transacted the business would himself know the fact. Still, however, I perceive nothing improper in the question; his answer may have shown the relevancy and propriety of the inquiry; and it is not to be supposed that the question would have been entirely overruled, but under the idea that Smith, being an indorser, would not be permitted to testify at all to the usury. Had not that idea prevailed, the question would have been so shaped by the judge, as to elicit all that the witness knew on the subject. We therefore grant the motion for a new trial, with costs, to abide the event of the suit." *Powell* v. *Waters*, 17 John. 179; *Weeks* v. *Lowerre*, 8 Barb. 532.

[1] *Moore* v. *Pearson*,, 6 Watts. & Sarg. 51; *Magill* v. *Coffman*, 4 Serg. & Rawle, 317; *Noble* v. *Martin*, 7 Martin, 282, N. S.; *Miller* v. *Russell*, 7 Martin, 266, N. S.

contemplation of law the act of the principal; and wherever the act of the agent will bind the principal, there his representations, declarations, and admissions respecting the subject matter will also bind him. If made at the same time, and constituting a part of the *res gestæ*, such declarations and admissions are original evidence, and not hearsay; they often become the ultimate fact to be proved, and not an admission of some other fact. The distinction between such acts as constitute a part of the *res gestæ* and such admissions and declarations as are only narratives of past acts, transactions, admissions, or declarations, is fully recognized and firmly established. The admissibility of the declarations of agents is founded upon the fact that they constitute a part of the body of the transaction, and are as much admissible in evidence as the proof of the act itself. But this rule does not extend to declarations made by the agent after his agency has ceased. Where the declarations or admissions of the agent, made in regard to a transaction that had already passed, but while his agency for similar objects still continues, it was held that they were not admissible.[1]

[1] *Haven* v. *Brown*, 7 Greenlf. 421–424; *City Bank of Baltimore* v. *Bateman*, 7 Har. & John. 114.

I see no legal objection in point of competency to any part of this evidence. If Teller was the authorized agent of the plaintiff for the purpose of receiving his share of the money (and it is only upon this supposition that proof of payment to the former is admissible at all), then his receipts or drafts for the money, or his admissions that it has been paid, are competent evidence of that fact. The agent in such a case need not be called personally to prove the payment, but it may be established by other evidence. I am not aware that this position has ever been questioned where the receipt is given or admission made at the time of the payment of the money or delivery of the goods or other thing which the evidence is designed to establish. So where an agency is established, what the agent says or does in making a contract becomes a part of the contract, or *res gestæ*, and is admissible in evidence against the principal. (3 T. R. 454; 7 id. 665; 1 Esp. Rep. 375; 4 Taunt. 511, 565, 663; 10 Ves. 128; 10 John. 44; 5 Esp. Rep. 74, 135; 2 id. 511, note; 2 Campb. Rep. 555; 1 Phil. Ev. 77; 2 Wheat. 380.) In this case we are to presume that it would have appeared from the receipts and drafts themselves, or been otherwise shown, that they related to the fund in question. The account I understand to have been offered in connection with the drafts and receipts, and not as an independent piece of evidence, and that the admission of a balance due to the defendant was made at the time of the settlement of the account. They all related to, and were parts of, the *res gestæ* to which the agency of Teller extended. This evidence, therefore, I think ought to have been submitted to the jury. It was competent, but not conclusive,

The rule, admittting the declarations of the agent as against the principal is founded upon the legal identity of the one with

against the plaintiff. He might have impeached it by showing either fraud or mistake on the part of Teller in making the settlement. What weight the evidence was entitled to with the jury is an entirely distinct question. *Thallhimer* v. *Brinckerhoff*, 6 Cowen, 99.

Per Curiam.—The principal point in this case is whether the declarations of Mrs. Fenner relative to the delivery of the horses were competent evidence. By the articles containing the covenant on which the suit is brought, the plaintiff and his wife agreed to a separation, and the defendant became a party to the agreement as her trustee. Provision was made for her maintenance and enjoyment of separate property. She was to live thereafter as *feme sole*, and was to receive from the plaintiff "for her separate use the coachee and horses which he had lately purchased." Both parties by the covenant concurred in her capacity to receive these article, and she became, for that purpose, their mutual agent. Her declaration or confession that the act was done became legal evidence of that fact as a necessary consequence of her authority under the articles to receive the coachee and horses; for no principle would seem to be more clear than that the person to whom performance of an act is agreed to be made is competent to acknowledge such performance. If she was competent to receive, she was competent to give a receipt for them; and if her receipt would have been good evidence of the delivery, her parol admission must be equally so. The marriage union had, by the articles of separation, essentially ceased, and the law would so far recognize such a separation as not to hold the husband any longer liable for her support. *Baker* v. *Barney*, 8 Johns. Rep. 72. The policy of the rule excluding husband and wife from being witnesses for or against each other is founded, according to one opinion (Lord Kenyon, in 3 Term Rep. 678), on the supposed bias arising from the marriage; and according to another opinion (Lord Harwicke, in *Baker* v. *Dixie*, Cases temp. Hardw, 252), on the necessity of preserving the peace of families. Neither of these reasons for the rule any longer applied here, and though the rule may still exist in the case to some purposes, it ought very readily to be made to yield to those cases which are exceptions to its application. Thus a wife's declaration of what she agreed to give a nurse was received as good evidence to charge the husband, because she was his agent in hiring the nurse. Anon. Stra. 527. So where the husband permits her to act for him in any particular business he adopts and is bound by her acts and admissions, and they may be given in evidence against him. *Emerson* v. *Blanden*, 1 Esp. Rep. 142. The defendant here agreed to be bound by her act in receiving the horses, and, of course, he is bound by her admission of the act; and the plaintiff has as good a right to avail himself of her confession as he would have of her receipt. If her act or admission be good in one case to charge the husband in favor of a third person because she was his agent, the rule ought equally to apply in favor of the husband when he and a third person by the contract between them have mutually referred to an act in which she was to be a party. *Fenner* v. *Lewis*, 10 John. 43; *Baring* v. *Clark*, 19 Pick. 220; *Burnham* v. *Ellis*, 39 Maine, 319.

the other, and, therefore, they bind only so far as there is authority to make them. Thus, where the cashier of a bank, being inquired of by the security upon a note, said that the note had been paid, and upon the faith of such representation the security released the property which he held to indemnify himself for liability upon the note, and it appeared that the note had not been paid, it was held that the statement of the cashier was not within his authority, and was inadmissible against the bank.[1] Where the agency is conferred by written instrument, the nature and extent of the authority must be ascertained from the instrument itself, and it can not be enlarged or varied by parol evidence; for that would be to contradict or to vary the terms of the written instrument. In connection with this doctrine, it may be stated that an implied authority can not in general take place where there is an express authority in writing; for the maxim is, *expressum facit cessare tacitum.* But we must be careful in the statement of this doctrine to confine it within proper limits, for otherwise one may be misled. The usage of a particular trade or business or of a particular class of agents is properly admissible, not for the purpose of enlarging the powers of the agent, but for the purpose of putting a construction upon those powers, that are actually conferred by the written instrument; for the means ordinarily used to execute the authority is included in the power, and may be resorted to by the agent. Thus, if an agent is authorized to sell goods, it is competent to show, by parol evidence, notwithstanding his authority may be in writing, where the written authority is silent upon the subject, by custom, that such agent was authorized to sell upon credit, as well as for cash; for it is presumed that the principal intended to clothe his agent with the power of resorting to all the customary means to accomplish the sale, unless he expressly restricts him.[2] The principal is presumed to authorize his agent

[1] *Bank* v. *Stewart*, 37 Maine, 519; *Bank* v. *Ten Eyck*, 4 Zabr. 756.

[2] *Scott* v. *Surman*, Willes's R. 407; *Houghton* v. *Mathews*, 3 Bos. & Pull. 489. Lord Ellenborough, C. J., said: "There are two subjects of considerations—the bill of lading for the pork, and that for the beef. First as to the pork, as there was no consideration paid for that bill of lading by the defendants, they not having in fact made any advance upon it, as they had engaged to do, and upon the faith of which it was agreed to be deposited with them, there was

to sell or transact other business in the usual manner, and only in the usual manner; therefore, a general agent for selling has no implied authority to bind his principal by a warrantee, unless

nothing to divest the original right, subsisting in the consignors to stop the goods *in transitu*, upon the insolvency of the consignee, who remained debtor for them. Then, as to the beef: I should be very sorry if any thing fell from the Court which weakened the authority of *Lickbarrow* v. *Mason*, as to the right of a vendee to pass the property of goods *in transitu* by indorsement of the bill of lading to a *bona fide* holder for a valuable consideration, and without notice for; as to *Wright* v. *Campbell*, though that was the case of an indorsement of a factor, it was an outright assignment of the property for value. Scott, the indorsee, was to sell the goods and indemnify himself out of the produce the amount of the debt for which he had made himself answerable. The factor at least purported to make a sale of the goods transferred by the bill of lading, and not a pledge. Now this was a direct pledge of the bill of lading, and not intended by the parties as a sale. A bill of lading, indeed, shall pass the property upon a *bona fide* indorsement and delivery, where it is intended so to operate, in the same manner as a direct delivery of the goods themselves would do, if so intended, but it can not operate further. Now if the factor had been in possession of the goods themselves, and had purported to sell them to the defendants *bona fide*, the property would have passed by the delivery; but not if he had only meant to pledge them, because it is beyond the scope of a factor's authority to pledge the goods of his principal. The symbol then shall not have a greater operation to enable him to defraud his principal than the actual possession of that which it represents. The principal who trusts his factor with the power to sell absolutely, shall, so far, be bound by his act; but the defendants shall not extend the factor's act beyond what was intended at the time, and here only a pledge was intended, which he had no authority to make. I consider the indorsement of a bill of lading, apart from all fraud, as giving the indorsee an irrevocable, uncountermandable right to receive the goods, that is, where it is meant to be dealt with as an assignment of the property in the goods, but not where it is only meant as a deposit by one who had no authority to do so; and having been dealt with, in this case, only as a deposit, it can not be made into a sale in order to give it effect." *Newsom* v. *Thornton*, 6 East, 40.

Per Curiam. The testimony in the case does not warrant the ground taken at the trial; that there was a sale of the wheat to three of the defendants. The nonsuit was granted on the assumption that there had been a sale to three only of the defendants, and that this evidence did not correspond with the contract declared on. This may be the import of the parol testimony; but the receipts given by, or in behalf of, all the defendants subsequent to the loose conversation alluded to by the witnesses, are a higher species of evidence, and ought to control the other. According to the receipts the wheat was received into the store as the wheat of the plaintiffs, and we must conclude that it was taken upon freight to be carried to New York, and sold by the defendants as agents or factors for the plaintiffs. The cause then ought to have been submitted to the

such warrantee was authorized by the custom of the trade or business in which the agent was engaged. Where there is no proof of usage or authority that authorizes an agent to sell on

jury on the point, whether the conversation between one of the plaintiffs and one of the defendants, when one load of wheat was delivered, amounted to an instruction to the defendants not to sell on credit. Such a special instruction was necessary, for otherwise the agent selling on a usual credit to a person, known and approved in the market, would not be responsible for the solvency of the vendee. The defendants received the wheat to carry to New York, and sell as agents and factors to the plaintiffs, and whenever persons are so employed it is to be understood, without special instructions to the contrary, that they are so employed to do it in the usual manner, and consequently they may sell on credit without incurring risk, provided they do not unreasonably extend the term of credit, and provided they make use of due diligence to ascertain the solvency of the purchaser. The authority of a factor to sell on credit is not to be disputed. *Scott* v. *Surman*, Willes's Rep. 406; 6 Term Rep. 12; *Russel* v. *Hankey*, 1 Camp. N. P. 258. Whether the evidence showed a special instruction to sell for cash was the point that should have gone to the jury. After laying down the general rule on the subject, the Court do not mean to give any opinion on the evidence, as to that point in this case; but they wish to leave it unbiased for a future trial. We are accordingly of opinion that a new trial be awarded, with costs, to abide the event of the suit. *Van Allen* v. *Vanderpool*, 6 John. 70.

The Court will take notice as a part of the law merchant, that a factor may sell goods at a reasonable credit at the risk of his principal when he is not restrained by his instructions nor by the usage of the trade. He is not, however, authorized to give credit to any but persons in good credit, and whom prudent people would trust with their own goods. If through carelessness, want of reasonable inquiry, he sell on credit to a man not in good credit, and there be a loss, the factor must bear it. When a factor sells on credit, he may take from the purchaser some instrument by which the purchase may appear, with the price and the time of payment, and on which the purchaser may be charged in an action at law. And it is very clear that he is not obliged to disclose to the purchaser the name of his principal, or even to state to him that he sells as factor. Upon these principles he may take a promissory note payable to himself—and when the principal lives in a foreign country it may be most convenient for him to have the security payable to himself so that he may sue it in his own name. When the security is in the name of the factor, he holds it in trust for his principal. If the principal demand it, offering to pay the commission, and the factor refuse to sign it, he then becomes answerable for the money. So if the money be lost by his negligence in not seasonably demanding it, the factor is responsible for his negligence. Upon these principles it seems very clear that in this case, if the defendant had taken a note to himself, not negotiable, to secure the payment of the money, he would have been a trustee of such note for the plaintiff, and if the money could not be recovered without any laches on the part of the defendant, he would, in law, be discharged.

credit, the agent's authority to sell will be construed to be limited to a sale for money; upon the same ground, in the absence of proof of usage, authority to buy goods will not authorize a pur-

But in this case the defendant took as security a negotiable note in his own name, and it is said that such note is payment, by which the purchaser is discharged from the principal, and consequently that the defendant assumed the debt on himself, and is, at all events, answerable. It must be admitted that in this State it has been settled by a series of decisions which can be traced back sixty years, that where a negotiable note is given to secure the payment of money due by a simple contract, the simple contract is holden to be satisfied or merged in the note, lest the debtor on the simple contract should be holden to pay it to the creditor, and afterwards, as promiser of the note, be holden to pay its contents to an innocent indorsee. But the discharge of the debt due by the simple contract is the consideration for the negotiable note. (See *Reed* v. *Upton*, 10 Pick. 525; *Jones* v. *Kennedy*, 11 Pick. 131; *Walkins* v. *Hill*, 8 Pick. 522, where it was held to be only presumptive evidence of payment which may be rebutted. The reason given by the chief-justice does not seem to be satisfactory. It is all that the debtor can reasonably require when sued upon simple contract, if judgment be suspended until the note given for the same considerationis produced and cancelled. *Raymond* v. *Merchant*, 3 Cowen, 147; *Hughes* v. *Wheeler*, 8 Cowen, 77. In fact, the doctrine in the text does not very well accord with the decisions repeatedly made, that a promissory note may be given and received in evidence to support a count for money paid or money lent.) When a factor shall receive a negotiable note in payment for goods sold on commission, as the consideration arises from the sale of his principal's goods, the note may be holden in trust for the principal; but if it be so holden in trust, and the principal demand the note, offering to pay the commission, and the factor refuse to assign it without a right of recurring to himself, this is a breach of his trust which will make him answerable. He is also answerable if he negotiate the note for his own use, or if the money be lost by his neglect of demanding it of the parties to the note. Although a negotiable note may change the remedy against the purchaser on credit if he fail to pay, yet the relation between the principal and factor may not be affected. If the law or the usage were not so, the disadvantages to the principal would be great. No factor would ever take a negotiable note as security in his own name unless for an extra commission as guaranteeing the payment. By taking such a negotiable note, the principal is not obliged to wait for his money until due, but the factor may immediately discount the note and receive the money. But when the principal lives abroad such discount is impracticable, unless by sending the note and having it returned indorsed by him. Another great benefit of a negotiable note in the name of the factor is, that he may, on the credit of it, make advances to his principal, which is often desired before the money is due, and the advances are easily procured by the factor's discounting the note. But if the note is in the name of the principal, the factor can not, on the credit of it, make any advances to his principal.

For these reasons I am satisfied that the principle holden by our courts, that a negotiable note is a bar to an action on the simple contract, which is the

chase upon the credit of the principal and the giving a negotiable security for the purchase money. Proof of agency can not be made out from the declarations of a professed agent, however publicly made, and although accompanied by acts, as by an actual signature of the principal. Such acts and declarations are not competent evidence in favor of third persons to establish the authority of the agent where such authority is questioned by the principal. An agent can not enlarge his authority any more by his declarations than he can by his other acts. The rule is clear, as we have previously stated, that the acts of an agent not within the scope of his authority do not bind the principal.[1]

consideration of the note, does not necessarily and absolutely affect the relation between a factor and his principle as to the authority of the former to take a negotiable note in his own name in trust for the latter. *Goodenow* v. *Tyler*, 7 Mass. 43.

[1] Dewey, Judge: The statement of Wellington to Wetherbee at the time of indorsing Lambert's name on a draft discounted by Wetherbee, that he had authority from Lambert to sign his name, was properly rejected. The declarations of a professed agent, however publicly made, and although accompanied by an actual signature of the name of the principal, are not competent evidence to prove the authority of such agent when questioned by the principal. *Mussey* v. *Beecher*, 3 Cush. 517; *Tuttle* v. *Cooper*, 5 Pick. 417. In a suit between the principal and a third person, it is quite enough to allow, as the law does, the agent to testify under oath to his authority to act for the principal. *Brigham* v. *Peters*, 1 Gray, 145.

The next exception that we have thought it important to consider is to the instructions of the presiding judge on the effect of Lambert's knowledge of the whole transactiona fter it had occurred, and his neglect to repudiate the agency and authority of Wellington in relation to the same. The instructions to the jury did not, as it seems to us, fully meet the case as presented, and were not as favorable to the defendant as they should have been. The question here was, whether Lambert was not bound by the acts of Wellington, who, professing to act as his agent, had parted with this note in payment of one or more notes due from Lambert, the whole transaction having afterwards become known to Lambert, and he having done nothing to repudiate it. The rule is a very stringent one upon the principal in such case, where, with full knowledge of the acts of his agent, he receives a direct benefit from them and fails to repudiate the acts. When the principal is informed of what has thus been done, he must dissent and give notice of his dissent within a reasonable time, and if he does not, his assent and ratification will be presumed. Paley on Agency (3d Amer. ed.), 171, note (p); 2 Kent Com. 616. The Court are of opinion that if the jury found the fact to be that this note was passed by Wellington to Way in payment of a debt or debts of Lambert, and that the fact of such transfer of the note for that purpose, with all the circumstances connected with the transaction, became

No one is bound to deal with the agent; whoever, therefore, does so, knowing him to be an agent, is admonished of the extent and limitation of the agent's authority, and must, at his own peril,

known to Lambert, it was the duty of Lambert, within a seasonable time after notice came to him of said facts, to repudiate the transaction and disavow the act of Wellington as unauthorized; and, if he failed so to do, he would virtually ratify and adopt the act of his professed agent and be bound by it. Exceptions sustained. *Brigham* v. *Peters*, 1 Gray, 147.

Shaw, Chief-Justice: This is an action of assumpsit for goods sold and delivered, which are alleged to have been purchased of the plaintiff by the defendant through the agency of William Pierce, acting under a power of attorney from the defendant. The question is upon the legal construction of the defendant's power of attorney to Pierce, which is in writing and is stated at large in the report. To this power was annexed the following proviso: "Provided, however, that said Pierce shall not make purchases or incur debts exceeding in amount, at any one time, the sum of two thousand dollars; and also that this power or agency shall not extend for a period of time beyond January 1, 1842." The power was afterwards extended, by a memorandum, to the 1st of January, 1843. The presumption is, that the plaintiff knew of the terms of this power and of its limitations before he sold goods to Pierce on the strength of it and on the credit of the defendant; and, indeed, the evidence was that he had seen the instrument. Various questions of fact were submitted to the jury on the evidence as to the extension of the power, or a waiver of the limitation, and the like; but the real question arises upon the correctness of the instructions in matter of law. The Court instructed the jury that the plaintiff must show that such goods were sold under the power to Pierce as his agent, and not upon the personal credit of Pierce; and that, although the power was limited, and such limitation was known to the plaintiff, yet that the defendant would be liable for Pierce's purchases even though he had already exceeded the amount authorized by the power, if they were satisfied from the evidence that at the time of the purchases Pierce represented that by such purchases he would not exceed his limit. In another connection the same instruction, in effect, was given, with a slight variance of form, as follows: "That if the plaintiff had inquired of Pierce about the agency, and had been informed by him that it was not full, and he had no reason to suspect the truth of Pierce's declaration, and if the plaintiff then sold goods to Pierce as agent, as aforesaid, the defendant would be liable for such goods even though the agency was then full." The former part of this instruction, that it must appear that the goods were not sold on the personal credit of Pierce is unquestionably correct; but in regard to the latter part, which makes the defendant responsible for the veracity and accuracy of Pierce, a majority of the court are of opinion that it was not correct in point of law. This power of attorney, which is in the nature of a letter of credit, is precise and limited in amount, and though it contains some expressions intimating that the attorney is the general agent of the constituent to purchase and sell goods, yet this is controlled by the proviso and express condition; and taken altogether, as every written instrument must be, it is an authority to purchase in the name and on the credit of the author

ascertain the fact upon which alone depends the authority to bind the constituent. Under an authority so peculiar and limited, it is not to be presumed that a person would deal with the agent who has not full confidence in his honesty and veracity and in the accuracy of his books and accounts.

of the power to the amount of two thousand dollars and no more. The precise point is this: whether if Pierce, through design or mistake, represented to the plaintiff that when he made the purchase in question he had not purchased on the credit of his principal to the amount of two thousand dollars when in truth his purchases exceeded that sum, the defendant was bound by it. It is unquestionably true that the statements and representations of an agent in transacting the business of his principal within the scope of his authority, are *res gestæ*, and are acts. But an agent can not enlarge his authority any more by his declarations than by his other acts, and the rule is clear that the acts of an agent not within the scope of his authority, do not bind the principal. It is often said, indeed, that one is bound by the acts of a general agent, though done against his instructions. This is because the acts are within the scope of his authority, and the violation of his instructions in the execution of such authority is a matter solely between himself and his principal, which can not affect a stranger dealing with him without express notice. The argument is, that the defendant ought to be bound because Pierce was his agent, and he, by his letter of attorney, had put it in his power to make such purchase. This, it appears to us, assumes the very point to be proved. The plaintiff knew that he was limited to two thousand dollars; he knew, therefore, that if he had purchased to that amount, his power, by its own limitation, was at an end. If it were otherwise, a power to purchase to the amount of two thousand dollars would operate as a power to purchase to an unlimited amount. But it is urged, that upon this construction no one could safely deal with the agent. This objection we think is answered by the consideration that no one is bound to deal with the agent. Whoever does so is admonished to the extent and limitation of the agent's authority, and must, at his own peril, ascertain the fact upon which alone the authority to bind the constituent depends. Under an authority so peculiar and limited, it is not to be presumed that one would deal with the agent who had not full confidence in his honesty, veracity, and in the accuracy of his books and accounts. To this extent the seller of the goods trusts the agent, and if he is deceived by him, he has no right to complain of the principal. It is he himself, and not the principal, who trusts the agent beyond the expressed limits of the power; and, therefore, the maxim that where one of two innocent persons must suffer, he who reposed confidence in the wrong-doer must bear the loss, operates in favor of the constituent and not in favor of the seller of the goods. *Parsons* v. *Armor*, 3 Pet. 413; *Stainer* v. *Tysen*, 3 Hill, 279; *Atwood* v. *Munnings*, 7 Barn. & Cr. 278.

The case of *Putnam* v. *Sullivan*, 4 Mass. 45, was decided on the ground that the defendants, by leaving blank indorsements with their clerk, had authorized him, by his act, to bind them as indorsers. *Mussey* v. *Beecher*, 3 Cush. 515.

The general rule is, that a principal is bound by the act of his agent no fur-

It is the party dealing with the agent, and not the principal, who trusts the agent beyond the express limit of the power; and, therefore, the maxim that "Where one of two innocent persons must suffer, he who reposes confidence in the wrong-doer must bear the loss," operates in favor of the constituents, not in favor of the one dealing with the agent.[1] It is evident that from what

ther than he authorized that agent to bind him; but the extent of the power given to an agent is deducible as well from facts as from express delegation. In the estimate or application of such facts, the law has regard to public security, and often applies the rule that "he who trusts must pay." So, also, collusion with an agent to get a debt paid through the intervention of one in failing circumstances has been held to make the principal chargeable on the ground of immoral dealing. *Parsons* v. *Armor*, 8 Curtis, 470; *Trustees, etc.*, v. *Bledsoe*, 5 Ind. 133.

[1] By the Court, Cowen, J. "The argument by which those who advance money, or discharge debts on the faith of paper, executed under letters of attorney like this, claim that the principal should be bound at all events, is that he has authorized another in general words, and without any qualification, to give his notes. That, having given such authority, he can not require any person, who takes under it, to notice and decide at his peril whether the agent act in good faith towards his principal or not. That he has virtually authorized his agent to speak conclusively, and by way of estoppel, as to all extrinsic circumstance, all facts not apparent on the face of the power, or actually known to the man who trusts to it. That the attorney, by the very act of making the note, etc., does, in effect, declare that it is available. Some of us felt so much difficulty upon this argument in *The North River Bank* v. *Aymar*, that we had the question under advisement, and directed a second discussion, which took place in the course of the same term at which the present case was argued (May Term, 1842). The answer given to the argument is that such letters of attorney import in their own nature an obligation to act for, and in behalf of, the principal, and in his proper business; that the man who receives the note is bound to look to the power, and in so doing, must take notice of its legal effect at his peril; that he is therefore bound to see that the attorney does do not go beyond his power by making or indorsing notes for the benefit of himself or persons other than his principal. The authorities *pro* and *con* are cited in *The North River Bank* v. *Aymar, ante*, p. 262. But we are all of the opinion that the necessity for weighing these arguments does not exist in the case before us. It can not be pretended that where the person who takes the note is aware of the attorney acting fraudulently toward his principal, there is any color for insisting on the ground of estoppel. There is no doubt that a power drawn up nakedly to do acts for, and in the name of, the principal negatives all idea of interest in the agent or authority to act for the benefit of any one besides the principal. This limitation, therefore, the plaintiff was bound to notice. It is an intrinsic fact; and when he is, moreover, told that the attorney, as between himself and principal is abusing his trust, the reason for making the act conclusive entirely ceases. The plaintiff himself then becomes a party to the fraud.

we have already said, that the rule under consideration, that the declarations, admissions, and acts of the agent, are only receivable in evidence, where they constitute a part of the subject matter under investigation, applies, when the question arises between the principal and third parties, that the declarations of the agent may be offered in evidence on a trial or investigation between the principal and the agent against the agent, the same as against any other party to the proceeding; and where the declarations or admissions of an agent constitute a part of the *res gestæ*, they may be offered in evidence in favor of the agent in a suit against him by the principal and against the principal. In general, a person is not answerable criminally for the acts of his servants or agents, unless a criminal design is brought home to him, or he is an accessory before, or after the act; but the act of the agent or servant upon the trial of an indictment, or upon a Church investigation against the principal, may be introduced in evidence, as tending to show that such act was done, after first laying the foundation, as in civil cases, by proof of the agency. For a fact may be shown which tends to connect the defendant or principal with it, whether it was followed by civil or criminal consequences; but it is a totally different question in consideration of criminal law, how far the principal may be affected when the fact is so established. There are a few apparent exceptions to this rule. The case of a bookseller or the publisher of a newspaper is, to some extent, an exception, but to what precise extent is, perhaps, yet an unsettled question. Some of the leading cases only carry the doctrine of publication so far as to hold that

In this case he must be presumed to have known who it was that constituted the insolvent firm of George W. Tysen & Co., the payees of the note—a firm which had just compromised with him, and that this defendant was, therefore, not a member of the firm. Had he been, there was no need of George acting as attorney. When a person sees the note of a stranger, made and indorsed by one of the payees to discharge their own debt, and takes such an indorsement, he has seen enough in connection with the power to raise a strong suspicion, not to say conviction, that the whole is a fraud upon the stranger. It is too much to allow that he may shut his eyes and say he supposes there was some special circumstances on which the attorney had a right thus to act. The transaction is, on its face, out of the ordinary course of business. This was of itself sufficient to put him on inquiry. In the case of *The North River Bank* v. *Aymar*, it was assumed that the plaintiffs were *bona fide* holders. *Stainer* v. *Tysen*, 3 Hill, 280; *Atwood* v. *Munnings*, 7 Barn. & Cress. 278.

the act of the servant is *prima facie* evidence against the principal, but not privy to or encourging it. So, also, it is said that the defendant, in such cases, may rebut the presumption by showing that the libel was sold contrary to his orders, or under circumstances denying all privity on his part.[1] Again it has been held that

[1] Another class of cases, where the liability of the master for the criminal acts of the servant has been recognized, has arisen under revenue laws, and police regulations. In *Attorney-General* v. *Siddons*, 1 Cromp. & Jarv. 220, and 1 Tyrw. 41 (a case of concealing smuggled goods), it was held that a trader is liable to a penalty for the illegal act of a servant, done in the conduct of his business, with a view to protect the smuggled goods, though the master be absent at the time the act is done. It seem here again to have been held only *prima facie* evidence, and that the master might have introduced evidence for the purpose of rebutting such *prima facie* case. In *Attorney-General* v. *Riddle*, 2 Cromp. & Jarv. 493, and 2 Tyrw. 523, which was an information under St. 1 Geo. 4 c. 58, prohibiting the delivery of paper not tied up, and labeled, and requiring before it is removed from the place of manufacture that it be inclosed in a labeled wrapper, the evidence was that the wife of the defendant, having authority from him to do certain acts in his trade of a paper manufacturer, pledged paper, which had no wrapper or label on it, the Court held that the authority of the wife was a question for the jury, and that it ought to have been left to the jury to decide whether or not the acts of the wife under the circumstances stated were done by the authority of the husband. It seems to us, that the case of a sale of liquors, prohibited by law, at the shop or establishment of the principal, by an agent or servant usually employed in conducting his business, is one of that class in which the master may properly be charged criminally for the act of the servant. But in looking at the question presented by the bill of exceptions in the present cases, and considering what should be stated as the rule as to the responsibility of the principal or master in such cases, the Court have come to the opinion that the law was stated too strongly upon that point against the defendant, inasmuch as the defendant, under the instructions given, might have been found guilty of the charge in the indictment, if a sale had been made in his shop, by any person in his employment, without any reference to the circumstances under which the sale was made, and, although against the will, and in contravention of the orders of the defendant. We think that a sale by the servant, in the shop of the master, is only *prima facie* evidence of such sale by the master as would subject him to the penalty for violating the statute, forbidding the sale of spirituous liquors without license; that the relation of these parties, the fact that the defendant was in possession of the shop, and was the owner of the liquor, and that the sale was made by his servant, furnish strong evidence to authorize and require the jury to find the defendant guilty. But we can not say that no possible case can arise, in which the inference from all these facts may not be rebutted by other proof. Unexplained, they would be sufficient to convict the party. So too, it should be understood that merely colorable dissent, or a prohibition not to sell, however publicly or frequently repeated, if not made *bona fide*, will not avail. But if a sale of

booksellers and the proprietors of newspapers, were liable to answer criminally for sales made by their servants and agents, although the particular act of sale or publication was without their knowledge; while this fact should influence the degree of the punishment to which the bookseller or publisher of a newspaper may be liable, it does not exonerate him from responsibility.[1] In a recent case it was held that where a person derives profit from, and furnishes means for, carrying on the sale of books, and intrusts the conduct of the sale of books, or publishes a newspaper, and intrusts the conduct of the sale or publication to one whom he selects, he ought to be answerable, although it can not be shown that he was criminally concerned in the particular act of publication. Lord Tenterdon said: "I do not mean to say that some possible case may not occur in which he would be exempt, but generally speaking he is answerable." Another

liquor is made by the servant without the knowledge of the master, and really in opposition to his will, and in no way participated in, approved, or countenanced by him, and this is clearly shown by the master, he ought to be acquitted. *Commonwealth* v. *Nichols*, 10 Metcalf, 261. Metcalf, J. "The question in these two cases, though somewhat differently presented, is, in substance and effect, the same, namely, whether an indictment or complaint, which alleges that A sold spirituous or intoxicating liquor without any legal authority, contrary to St. 1852, c. 322, § 7, is supported by proof that he sold it by his clerk, servant, or agent. It was decided in *Commonwealth* v. *Nichols*, 10 Met. 259, that a party might be convicted under the Rev. Sts. c. 47, on an indictment for the unlawful sale of spirituous liquor by a servant or agent, applied in his business. The question, however, whether the indictment in such case should allege that the sale was by him through his servant's agency (as in the present case, it is contended that it should), was not there raised nor discussed. But it is a general rule in civil action, and in prosecutions for misdemeanors, that when a declaration or indictment alleges that a person did an act, such allegation is sustained by proof, that he caused it to be done by another. 3 Stark. Ev. 4th Am. Ed. 1852. Thus, in an action to recover damages, alleged to have been caused by the defendant's negligence in driving a carriage, proof that the damage was caused by his servant's negligence in driving it, supports the allegation. *Bruckor* v. *Fromont*, 6 T. R. 659. See, also, *Hays* v. *Heselline*, 2 Camp. 604; *Phelps* v. *Riley*, 3 Conn. 266. So an indictment which charges the defendant with publishing a libel, is supported by evidence that he procured another person to publish it. Archb. Crim. Pl. 5th Am. Ed. 527, 528; *Rex* v. *Gutch*, Mood. & Malk. 437. And an indictment which charges the defendant with selling lottery tickets contrary to law, is supported by proof that he sold them by his servant. *Commonwealth* v. *Gillespie*, 7 S. & R. 469, 478; *Commonwealth* v. *Park & Reed*, 1 Gray, 554; *Rex* v. *Almon*, 5 Burr. 2686.

[1] *People* v. *Wilson, et al.* 64 Ill. 210.

class of cases, where the liability of the master or principal for the criminal act of the servant or agent has been recognized, has arisen under the revenue laws and police regulations. Thus, in a case of concealing smuggled goods, it was held that a trader was liable to a penalty for the illegal act of a servant, done in the conduct of his business with a view to protect the smuggled goods, though the master be absent at the time the act is done. It seems here again, however, to have been held only *prima facie* evidence, and that the master might have introduced evidence rebutting such *prima facie* case. It was held in two cases in Massachusetts, where parties were indicted for selling intoxicating or spirituous liquors without legal authority, that the charge was supported by proof that he sold it by his clerk, servant, or agent. And in the same cases it was held that the indictment need not allege that the sale was by him through his clerk, servant, or agent; so, also, it was held that an indictment that charged the defendant with selling lottery tickets contrary to law is supported by proof that he sold them by his servant.[1]

[1] The first question that arises is upon the division of opinions whether, under the circumstances of the case, the testimony of Captain Coit to the facts stated in the record, was admissible. That testimony was to the following effect: That he, Captain Coit, was at St. Thomas while *The General Winder* was at that island, in September, 1824, and was frequently on board the vessel at that time; that Captain Hill, the master of the vessel, then and there proposed to the witness to engage on board *The General Winder* as mate for the voyage then in progress, and described the same to be a voyage to the Coast of Africa for slaves, and thence back to Trinidad de Cuba; that he offered to the witness seventy dollars per month, and five dollars per head for every prime slave which should be brought to Cuba; that on the witness's inquiring who would see the crew paid in the event of a disaster attending the voyage, Captain Hill replied, "Uncle John," meaning (as the witness understood) John Gooding, the defendant. It is to be observed, that as preliminary to the admission of this testimony, evidence had been offered to prove that Gooding was owner of the vessel; that he lived at Baltimore, where she was fitted out; that he appointed Hill master, and gave him authority to make the fitments for the voyage, and paid the bills therefor; that certain equipments were put on board peculiarly adapted for the slave-trade; and that Gooding had made declarations that the vessel had been engaged in the slave-trade and had made him a good voyage. The foundation of the authority of the master, the nature of the fitments, and the object and accomplishment of the voyage, being thus laid, the testimony of Captain Coit was offered as confirmatory of the proof, and properly admissible against the defendant. It was objected to, and now stands upon the objection before us. The argument is, that the testimony is not admissible, because in criminal cases the

CHAPTER XIII.

HEARSAY EVIDENCE.

SUBJECT to the exceptions that have already been considered at some length, hearsay evidence of a fact is not admissible as evidence of the fact, or even as evidence tending to establish it. All questions upon the rules of evidence are of vast importance to all orders and to all conditions of men. Our lives, our liberty, and our property are all concerned in the support of these rules, which have been matured by the wisdom of ages and are now revered, not only on account of their wisdom, but on account of their antiquity. "One of these rules," says Chief-Justice Marshall, "is, that hearsay evidence is, in its own nature, inadmissible." That this species of testimony supposes something better which might be adduced in this particular case is not the sole ground of its exclusion. Its intrinsic weakness, its incompetency to satisfy the mind of the existence of

declarations of the master of the vessel are not evidence to charge the owner with an offense, and that the doctrine of the binding effect of such declarations by known agents is, and ought to be, confined to civil cases. We can not yield to the force of the argument. In general the rules of evidence in criminal and civil cases are the same. Whatever the agent does within the scope of his authority binds his principal and is deemed his act. It must, indeed, be shown that the agent has the authority and that the act is within its scope, but these being conceded or proved either by the course of business or by express authorization, the same conclusion arises in point of law in both cases. Nor is there any authority for confining the rule to civil cases. On the contrary, it is the known and familiar principle of criminal jurisprudence, that he who commands or procures a crime to be done, if it is done, is guilty of the crime, and the act is his act. This is so true, that even the agent may be innocent when the procurer or principal may be convicted of guilt, as in the case of infants or idiots employed to administer poison. The proof of the command or procurement may be direct or indirect, positive or circumstantial; but this is matter for the consideration of the jury, and not of legal competency. So in cases of conspiracy and riot, when once the conspiracy or combination is established, the act of one conspirator in the prosecution of the enterprise is considered the act of all, and is evidence against all. Each is deemed to consent to, or command what is done by any other in furtherance of the common object. Upon the facts of the present case, the master was just as much a guilty principal as the owner, and just as much within the purview of the act, by the illegal fitment. *United States* v. *Gooding*, 7 Curtis, 287; *Commonwealth* v. *Gillespy*, 7 Serg. & Rawle, 469–478; *Phelps* v. *Riley*, 3 Conn. 266; Arch. Cr. Pl. & Pr. 5 Am. ed. 527, 528.

the fact, and the frauds which might be practiced under its cover, combine to support the rule that hearsay evidence is totally inadmissible. To this rule there are some exceptions, which are said to be as old as the rule itself. These are cases of pedigree, prescription, custom, some cases of boundary, of declarations against interest, and also of matters of general and public history, which may be received without that full proof which is necessary for the establishment of a private fact. The danger of admitting hearsay evidence is sufficient to admonish courts of justice and other tribunals sitting for the purpose of investigating facts, against lightly yielding to the introduction of fresh exceptions to an old and well established rule, the value of which is felt and acknowledged by all. The term hearsay applies as well to written as to oral declarations. It denotes that character of evidence which does not derive its value solely from the knowledge or from the credit to be given to the witness, or other testimony, but is dependent upon the veracity and competency of other evidence unsupported by the sanctity of the oath. It is often a very difficult question to distinguish between original and hearsay evidence, for it does not follow that words spoken by a third person are to be considered as hearsay; for it frequently occurs that the very fact in controversy is whether such words were spoken, or in case of writing, whether such instrument was written, and not whether the words spoken or the instrument written correctly recites the truth. Where such is the character of the inquiry, it follows, as a necessary corollary, that the writing or words does not fall within the definition of hearsay evidence, but is original and primary proof, and as such, admissible in evidence. This principle is often illustrated in actions for malicious prosecutions, in questions of agency, in questions growing out of the relation of trustee and *cestui qui trust*, and also in cases of insanity. Thus letters and conversations addressed to a person whose insanity is the subject of inquiry, being connected in evidence with some act done by him, are receivable as original evidence as tending to show the sanity or insanity of the person to whom such letters or conversations were addressed. The replies given to inquiries made at the residence of an absent witness concerning his absence are also original evidence. This doctrine is applicable to all other writings or communications where the fact that such

writing or communication was made is the point in controversy, and not its truth or falsity. Upon the same principle, evidence of general reputation, reputed ownership, public rumor, and the like, though composed of the speech of a third person, is original evidence. Upon the question whether a libelous painting was made to represent a certain individual, Lord Ellenborough permitted the declarations of the spectators, while looking at the picture in the exhibition room, to be given in evidence.[1] Upon the question as to whether a person was solvent or insolvent, general reputation was held admissible.[2] It was also held, that

[1] *Du Bost* v. *Beresford*, 2 Campb. 512.

[2] The question put by the plaintiff's counsel to the witness, Putnam, was competent on the ground, among others, suggested at the trial. Two suggestions were at issue: first, whether when the transfer was made Davis & Kilburn were insolvent; and, second, whether the defendant had reasonable cause to believe them to be insolvent. Upon the latter issue it was clearly competent to show they were reputed to be insolvent. *Lee* v *Kilburn*, 3 Gray, 598.

Metcalf, Judge, said: "The Court are of opinion that the witness, Ewing, should have been permitted to answer the interrogatory 'whether Boyington was in good reputation for property up to the time of the attachments.' In *Lee* v. *Kilburn*, 3 Gray, 594, it was held, that testimony was admissible to show that the debtor was reputed to be insolvent for the purpose of proving that his preferred creditor had reasonable cause to believe him so. It follows that testimony is admissible that a debtor was in good reputation for property for the purpose of showing that a preferred creditor had not reasonable cause to believe him insolvent. The testimony in both case is admissible on one and the same ground, namely, that men's belief as to matters of which they have not personal knowledge, is reasonably supposed to be affected by the opinions of others who are about them. Such testimony may be of very little weight, but it is to be weighed by the jury. The Court decide only on its competency.

The evidence offered by the defendant concerning the business, credit, and pecuniary standing of Noyes, the plaintiff's assignor, prior and up to the day of the date of the alleged fradulent sale, should have been admitted, as having a tendency to disprove the charge that he had reasonable cause to believe that said Noyes was at that time insolvent. Upon a question of that kind, the means of forming a judgment are commonly, and from necessity, very imperfect. Individuals can not, in general, resort to the most authentic sources of information to ascertain the pecuniary responsibility of parties with whom they deal. They are obliged to act upon opinions entertained and adopted in view of circumstances which are merely external and apparent, and hence they may well be presumed to be, in some degree, influenced in their transactions by the business credit and pecuniary standing which a party has acquired and maintained among his neighbors and acquaintances. When his motives to action in pecuniary transactions are called in question, considerations of this kind deserve attention, and, therefore, are properly subjects of inquiry and investigation. The weight and

it was competent to show that a party was reputed solvent, and that his creditor had not reasonable grounds for believing him to be insolvent.

The rule of law is now well settled, that where the bodily or mental feelings of a party are the subject of inquiry at a particular time, the usual and natural expressions made at the time are considered competent and admissible in evidence. This rule is founded upon the consideration that such expressions are the natural and necessary language of emotion, of the existence of which, from the very nature of the case, there can be no other evidence. There are ills and pains of the body and mind which are proper subjects of proof which can be shown in no other way. Such evidence, however, is not to be extended beyond the necessity upon which the rule is founded; therefore, any thing in the nature of a narration should be carefully excluded, and the testimony should be strictly confined to such complaints, explanations, and expressions as usually and naturally accompany and furnish evidence of a present existing pain or malady. Of course, it will always be for the jury, or for the triers of fact, to determine whether such expressions are real or feigned. The limitations of the rule above stated are not intended to apply to the statements made by a patient to a physician alone, but are equally applicable when made to any other person or persons.[1]

value of such evidence must, in each particular case, depend greatly upon the kind, nature, and strength of the proofs it is intended to encounter. Under some circumstances, which might easily be conceived, it would undoubtedly be of very little importance, while in other cases it might be effectual and decisive. Being properly admissible, the exclusion of proof concerning the credit and standing of Noyes deprived the defendant of the benefit of evidence to which he was justly entitled, and which if the jury had been allowed to hear and consider, might have been sufficient to have induced them to render a different verdict. 4 Gray, 113 & 579.

[1] She was questioned as to her bodily infirmity. She said it was of some duration—several days. She assigned her going to Manchester as a period when she was laboring much under the disorder. Then, if inquiries of patients by medical men, with the answers to them, are evidence of the state of health of the patients at the time, this must be evidence. What were the complaints, what the symptoms, what the conduct of the parties themselves at the time, are always received in evidence upon such inquiries, and must be resorted to from the very nature of the thing. The substance of the whole conversation was, that the wife had been ill at least from the 9th of November, when she was examined by the surgeon and certified to be in good health, down to the day when the conversa-

In an action for criminal conversation, it being material to ascertain the terms upon which the husband and wife had lived together before the seduction, their language and deportment towards each other, their conversation, and even their correspondence with third parties, are received in evidence.[1]

It is, however, always required that proof should be given that the declarations, or letters of a wife purporting to express her feelings, were of the time antecedent to the date of any fact calculated to arouse suspicion of a criminal nature, and when there existed no ground for imputing collusion. It has been held that the letters of the wife are inadmissible, if written after an attempt by the defendant to commit adultery; and so strict is this rule of construction, that it was held that the dates of the letters were not sufficient evidence of the time when they were written; but the postmarks on the back of a letter has been held to afford the requisite proof.[2] There can be no doubt in case of a rape that the declarations[3] of the injured female, made immediately or soon after injury inflicted, are competent testimony, provided the female herself had just been examined; competent, however, not for the purpose of proving the commission of the offense, but a corroboration of, or contradictory to, the statement in Court.[4] Although such testimony is competent for the

tion took place and those appearances were exhibited to the witness, and in that view I think the evidence was unexceptionable. It was also evidence in another point of view, for if the plaintiff produced the surgeon as a witness to show from his examination of the wife and what she told him, that she was in a good state of health and an insurable life on the 9th of November, this was but a sort of cross-examination, as it were, of the same witness to show from what she had said of herself to another person, that she was not really well when she told the surgeon so on that day. *Aveson* v. *Ld. Kinnaird*, 6 East, 194.

[1] *Trelvany* v. *Coleman*, 2 Stark. 191.

[2] *Wilton* v. *Webster*, 7 C. & P. 198.

[3] Whatever may be the rule elsewhere, it is settled in Ohio that in a prosecution for rape or for assault with intent, etc., the "substance of what the prosecutrix said," or the "declaration" made by her immediately after the offense was committed, may be given in evidence in the first instance to corroborate her testimony. *M' Comb* v. *The State*, 8 Ohio S. § 646.

[4] There can be no doubt that in a case of rape the declarations of the injured female made immediately, or soon after the injury inflicted, are competent testimony, provided the female herself has first been examined; competent not for the purpose of proving the commission of the offense, but as a corroborative of, or contradictory to, her statements made in Court. If these declarations are in

purpose before stated, it is not competent to prove the offense; as to that it is mere hearsay.[1] So, also, a prosecution for a conspiracy to assemble a large meeting for the purpose of extend-

accordance with the testimony given in Court, they tend to strengthen and give effect to that testimony; if against it the testimony is destroyed. If such testimony were to be entirely excluded when offered on the part of the prosecution, it would be extremely difficult to convict in any case. For, as a general rule, it would be dangerous to convict unless immediate complaint was made by the female to her friends or others. And that such complaint was made, and the substance of it ought not to be withheld from the jury. In this point of view and for this purpose testimony given by the mother (for the mother was the witness on the stand) of the declarations made by her daughter immediately upon her return home on the day the offense was said to have been given, was competent. *Johnson* v. *The State*, 17 Ohio, 595.

[1] 38 Eng. Com. Law R. 173. It is said (1 Chit. Cr. Law, Riley's Ed. 481, 1 Leach, 110, 199), "it was once thought that when the party immediately injured was an infant of tender years, the parents of the child might be admitted to state the account he had given of the transaction, immediately after it had taken place, and that the infant might be examined *though not sworn* (and so is the authority of 2 Hale, 278; 9 Bull. N. P. 293); but both these ideas are now rejected, and it is fully established that if the infant is of competent discretion, he may be sworn, however young, and if not, no evidence whatever can be given respecting his assertions." That being the true rule in case of a person *immature* in intellect, I can not see why the reason of the rule does not apply with as much force to exclude all evidence of the declarations, assertions, or signs made supposed to communicate ideas, by a person who is incompetent to be sworn as a witness by reason of idiocy, or weakness of intellect for any cause, as evidence of the commission of the offense, or to affect the credit of any other witness. I do not understand the objection as going against any evidence of the appearance and condition of the female at the time, but only as against communications made by her to the witness, by which she informed him of particular injuries inflicted upon her, tending to prove forcible sexual connection, or from which it could properly be inferred. *The People* v. *M' Gee*, 1 Denio, 22.

It should, however, be understood that I do not place my opinion as to the admissibility of the witness objected to, upon the question whether the female witness was competent to testify or not. In either case I consider the evidence inadmissible upon principle. The view I have taken of it, I think is sustained by recent cases in the English Courts. *Reg.* v. *Gutridge*, 9 Carr. & Payne, 471; *Reg.* v. *Megson*, id. 428; and I do not doubt that the true rule is, that when the person upon whom the offense is charged to have been committed, is incompetent by reason of infancy, idiocy, insanity, and the like, to be sworn and give evidence as a witness, that no evidence of the assertions or declarations of such person, descriptive of the offense, or the offender, can be received in evidence; and that the declarations of the person upon whom the injury has been inflicted in relation to it are only proper to be given in evidence to affect the credibility of the person, after having testified in the cause. I think the objection was well taken. *The People* v. *M' Gee*, 1 Denio, 24.

ing terror in the community. The complaints of terror, made by the persons professing to be alarmed, were permitted to be proved by a witness who heard them without calling the persons themselves.[1]

Under this head may be considered evidence, although in the nature of hearsay, which is admitted in cases of pedigree. The term may include cases involving parentage or descent of an individual, and in order to ascertain this fact, it often becomes material to determine how the individual who is the subject of investigation was regarded by those who are interested in him, or those who sustain relationship toward him, either by blood or affinity. In some of the earlier cases, the declarations of servants, and even of neighbors, were admitted; but it is now settled that hearsay evidence in cases of pedigree is only admitted upon the ground of the interest of the declarants in the person from whom the descent is claimed, and their consequent interest in knowing the connection of the family. The rule of admission is now restricted to the declarations of deceased persons who were related by blood or marriage to the person, and, therefore, interested in the succession in question; and the general repute or declarations of the family, proved by the testimony of a surviving member of it, or any other competent witness, has been held admissible.[2]

[1] *Regimen* v. *Vincent, et al.* 9 C. & P. 275.

[2] In almost all the books which treat on the subject of evidence it is laid down that the register of births, marriages, and burials is competent evidence, and wherever an original is of a public nature and admissible in evidence, an examined copy will be equally admitted. Phil. 320, 306; Peak. 86; Bull. N. P. 247. This rule is necessary as well for the security of the instrument as for the convenience of the public. In addition to this, the hearsay evidence of pedigree was competent and of itself sufficient.

Baron Gilbert, in his Treatise on Evidence, 112, lays down the rule that hearsay is good evidence to prove who is the grandfather, when he married, what children he had, of which it is not reasonable to suppose the party has better evidence. Bogert testified that from conversation in his family and among his relations from his infancy he always understood and had been informed that Magdalena Pelts was the daughter of one Simon Appel, and that Simon was the oldest son of one William Appel. Testimony as to pedigree is not to be tested by the ordinary rules of evidence; it forms an exception to the general rule. Hence it is, that any thing which shows a general reputation is admissible to establish it. Peak. 9. In Cowp. 591 (*Goodright* v. *Moss*), Ld. Mansfield held that tradition is sufficient in point of pedigree. Ld. Kenyon observed, in the

The term pedigree embraces descent and relationship, and also the facts of birth, marriage, and death, and the time when those events occurred; also an entry made by a deceased parent or other relative in a Bible, family missal, or any other book, or in any document or paper, stating the fact; and the date of the marriage, birth, or death of a child or other relative is regarded as a declaration of such parent or relative in a matter of pedigree; and this doctrine has been held to warrant the admission of declarations made by a person since deceased, as to where his family came from and of what place his father was designated. The correspondence of deceased members of the family is receivable in evidence; also recitals in family deeds, marriage settlements, wills, and other solemn acts, are regarded as original evidence; affidavits made several years before to prove pedigree by official requirement and prior to any *lis mota* are admissible; engravings upon rings, and charts of pedigree hanging up in family mansions or found in family documents, are receivable in evidence; inscriptions upon tombstones or other funeral monuments, inscrip-

case of *The King* v. *The Inhabitants of Enswell* (3 T. R. 723): "I admit that the declarations of the members of a family, and perhaps of others living in habits of intimacy with them, are received in evidence as to pedigree; but evidence of what a mere stranger has said has ever been rejected in such cases." This doctrine was also sanctioned by this Court in *Jackson* v. *Cooley* (8 John. 128). In *Jackson* v. *Boneham* (15 John. 226), a sworn copy of the records of the town of Stonington, which contained the date of the marriage of the parents of the lessors and the time of the birth of their children, was admitted. In the opinion delivered by Thompson, Ch. J., he says: "We do not perceive any objection to the admission of a sworn copy of the records as evidence of the family." *Jackson* v. *King*, 5 Cowen, 238, 239.

Spencer, Chief-Justice, delivered the opinion of the Court. Mr. Justice Le Blanc, in *Higham* v. *Ridgway* (10 East, 120), lays down the rule of evidence in cases of pedigree with perspicuity, and places it on a reasonable ground. He considers it as a departure from the strict rules of evidence on account of the great difficulty of proving remote facts in the ordinary way by living witnesses, "and on this ground," he says, "hearsay and reputation (which latter is the hearsay of those who may be supposed to have known the fact handed down from one to another), have been admitted as evidence in cases of pedigree." "The tradition," says Lord Eldon, in Whitelock and Baker (13 Vesey, 514), "must be from persons having such a connection with the party to whom it relates that it is natural and likely, from their domestic habits and connections, that they are speaking the truth and that they could not be mistaken." *Jackson* v. *Browner*, 18 John. 38; *Chatman* v. *Chatman*, 2 Cowen, 347; *Waldron* v. *Tuttle*, 4 New Hamp. 371.

tions upon coat of arms, have sometimes been relied on in questions of pedigree. This evidence is admitted upon the presumed fact that the relatives of the family would not permit an inscription without foundation to remain, and that a person would not wear a ring with an error on it. Mural and other funeral inscriptions are provable by copies or other secondary evidence; but their weight as evidence depends much on the authority under which they are made and the distance of time between their erection and the events they commemorate. The credit of monumental inscriptions, however, may always be impeached, and their evidence seems peculiarly open to attack, not only on account of the great facility for forgery, but also because the preparation of them is often committed to executors or other members of the family.[1]

The tacit recognition of relationship and the disposition and devolution of property are admissible evidence. And from such evidence the opinions and belief of the family may be inferred; thus, where a father is proved to have brought up the party as his legitimate son,[2] this amounts to a daily assertion that the son is legitimate.[3] So the declaration of a person since deceased that he was going to visit his relatives at a particular place was held admissible evidence that the family had relatives at that place. It is fre-

[1] There are several well known instances mentioned in Collins on Barroney's, page 363 and note, of mistakes or misstatements as to the time of birth and time of death, and it is evident that this species of evidence is not conclusive, but is only *prima facie* evidence of the facts.

[2] The said John Reed was the reputed son of Andrew Reed, but there was no direct evidence of the marriage of Andrew with the mother of John. The said Andrew was one of the first settlers at Boothbay, and came to that place with a woman whom he called his wife, and resided there at the incorporation of the town. He and the mother of John Reed lived together in good reputation as man and wife, and the said John was one of the said Andrew's family—was received and spoken of as his son, and treated as his other children were. This being the only question in the case, the judge directed the jury that they might lawfully presume the said John Reed to be the legitimate son of Andrew Reed upon this evidence of reputation; and thereupon the defendants submitted to a verdict, the judge consenting to reserve the question as to the legal effect of this evidence for the consideration of the Court. *By the Court.*—The jury might lawfully infer a legal marriage from the evidence at the trial; a long continued cohabitation is, in fact, one usual evidence of a marriage. *The Inhabitants of Newburyport* v. *The Inhabitants of Boothbay*, 9 Mass. 414.

[3] *Berkley Peerage Case*, 4 Campb. 416.

quently said that general reputation is admissible to establish the fact of the marriage of the parties. Evidence of the parties being received into society as man and wife, and being visited by respectable families in the neighborhood in which they resided, and of their addressing each other as persons actually married, and of their attending Church and other public places together as husband and wife, are admissible as evidence. So where a gentleman introduced a female who was previously living with him as his housekeeper to his friends as his wife, and from that time for the period of eleven years continued to live with her as his wife, holding her out to the world as sustaining that relation to him and having several children by her who were called by his name; held that these facts were sufficient to authorize a court or jury to presume an actual marriage between the parties by a contract *in presenti*[1] at the commencement of such matrimonial cohabitation. The acts and declarations of a man and of a woman, and other attending circumstances[2] during their cohabitation together, being part of the *res gestæ*, are proper evidence[3] to show the character

[1] For it is now a settled rule of the common law which was brought into this State by its first English settlers, and which was probably the same among the ancient Protestant Dutch inhabitants, that any mutual agreement between the parties to be husband and wife *in presenti*, especially where it is followed by cohabitation, constitutes a valid and binding marriage, if there is no legal disability on the part of either to contract matrimony. 2 Kent's Com. 87; *Rose* v. *Clark*, 8 Paige, 580.

[2] Declarations of parties and other attending circumstances, in order to render them admissible in evidence as a part of the *res gestæ*, must be contemporaneous with the main fact under consideration and to which they are intended to give character. Thus if a man and woman are cohabiting together, and the question to be decided is whether the character of her intercourse with him is matrimonial or meretricious, the declarations of the parties during the existence of such intercourse, the fact of their appearing in public with each other as husband and wife, of their visiting in respectable families, and of their being treated by their acquaintances and spoken of by them as sustaining that relation to each other, constitutes a part of the *res gestæ*, showing the character of that intercourse to be matrimonial and virtuous; and contemporaneous declarations and attending circumstances of a different character would be legal evidence from which the conclusion might legitimately be drawn that the intercourse between the parties was illicit and dishonorable. 9 Paige, 616.

[3] It is stated that there was not proof of any subsequent marriage *in fact*, and that no solemnization of marriage was shown to have taken place. But proof of an actual marriage was not necessary. Such strict proof is only required in prosecutions for bigamy and in actions for criminal conversation. 4

of their intercourse, whether it was matrimonial or meretrecious. But general reputation as to the character of such intercourse after it had ceased, or the declarations and admissions of the parties made subsequent to that time, are not legal evidence to rebut the presumption of an actual marriage arising from such cohabitation[1] and other acts, and to establish the fact that their children are legitimate.

CHAPTER XIV.

RES GESTÆ.

We have had occasion frequently to refer to the declarations and admissions of parties as constituting a part of the *res gestæ*, but have given no definition of the term. In order to be a part of the *res gestæ*, or the subject matter or thing done, the declarations or admissions must have been made at the time the act was performed which they are supposed to characterize, and must be well calculated to unfold the nature and quality of the facts they are intended to explain, and so to harmonize with them as obviously to constitute one transaction. Thus, when it is necessary in the course of a cause to inquire into the nature of a particular act, or the intention of the person who did the act, proof of what

Burr. 2057; Doug. 171. A marriage may be proved in other cases from cohabitation, reputation, acknowledgment of the parties, reception in the family, and other circumstances from which a marriage may be inferred. 4 Burr. 2057; 1 Esp. Cases, 213; 2 Bl. Rep. 877; Peake's Cases, N. P. 231. No formal solemnization of marriage was requisite. A contract of marriage made *per verba de presenti* amounted to an actual marriage, and is as valid as if made *in facie ecclesiæ*. 6 Mod. 155; 2 Salk. 437; Peake's Cases, 231; *Fenton* v. *Reed*, 4 John. 53.

[1] No peculiar form of words is necessary to such a contract. In *Morton* v. *Fenn* (3 Doug. 211), it appeared that the defendant promised to marry the plaintiff if she would go to bed with him that night, which she did, and lived afterwards with him a considerable time. Lord Mansfield remarked, that before the Marriage Act this would have been a good marriage, and the children legitimate by the rules of the common law. Holt, C. J., in Wigmore's case, 2 Salk, 438, S. P.; *Dumarsly* v. *Fishly*, 4 Marsh. (Ken.) Rep. 372, S. P. Thus a contract in words merely executory, followed by the act of the parties in lying together on the faith of such contract, is equivalent to words of present import. The circumstances are to be taken as giving a construction to the words and rendering them presently operative. 3 Marsh. *ut. supra.*; *Starr* v. *Peck*, 1 Hill, 274.

the person said at the time of doing it is admissible evidence as part of the *res gestæ* for the purpose of showing its true character. On an indictment for a rape, for example, what the girl said so recently after the fact as to exclude the possibility of practicing on her, has been held to be admissible as a part of the transaction.[1] Where a party on removing an old fence put down a stone in one of the post-holes, and the next day declared that

[1] Obscene or slanderous conversations, serious arguments against the truth of revelation, and the like, might have been pertinent, as we receive arguments in favor of atheism coming from a witness to show his incompetency from defect of religious principle. Such declarations are a part of the *res gestæ*. But I am not prepared to concede that when the people have instituted a criminal prosecution they lie in any case at the mercy of mere naked admissions made by the party injured, when they do not introduce him as a witness. *Barthelemy* v. *The People*, 2 Hill, 257.

It is undoubtedly true, as a general rule of evidence, that the statements of a party in regard to the subject matter of his own suit are inadmissible unless introduced by his adversary. But this rule is necessarily subject to many exceptions, and the admission or rejection of such testimony must, in some measure, depend upon, and be governed by, the nature of the case and of the facts to be proven. Thus, it has been frequently held, that when one enters into land in order to take advantage of a forfeiture, to forclose a mortgage, to defeat a disseisin, or the like; or where one changes his residence, or is upon a journey, or leaves his home, or does any act material to be understood, his declarations made at the time of the transaction and expressive of its character, motive, or object, are regarded as "verbal acts indicating a present purpose and intention," and are therefore admitted in proof like any other material facts, leaving their effect to be governed by other rules of evidences. So the state of mind, sentiments, or disposition of a person at any particular period may be ascertained from his declarations and conversations at that time. And no objection can exist to the admissibility of such evidence so long as the statements and declarations thus introduced are concomitant with, and explanatory of, the act or occurrence to which they relate. In *Sessions* v. *Little*, 9 N. H. Rep. 271, it is held that "where evidence of an act done by a party is admissible, his declarations made at the time having a tendency to elucidate or give character to the act, and which may derive a degree of credit from the act itself, are also admissible as part of the *res gestæ*." But the reason of this rule by no means applies to such statements as are merely narrative of a past occurrence, and they are clearly inadmissible. *Wetmore* v. *Mell*, 1 Ohio S. 27.

The conduct and exclamations of passengers in the cars were not improperly admitted as tending to show how the circumstances of apparent danger affected every one, and to some degree explain defendant's conduct and vindicate from rashness and imprudence from undue alarm. It is impossible for a witness to convey such scenes to the mind and their effect and influence upon it. Such general conduct, with the exclamations involuntarily thrown out by appearances

he placed it there as a boundary, it was held, that this declaration not constituting a part of the act done, was inadmissible in his favor.[1] But in an action by a bailor against the bailee for loss caused by his negligence, the declarations of the bailee contemporaneous with the loss, were admissible in his favor to show the nature of his loss.[2]

The declaration of a person wounded and bleeding, made immediately after the occurrence, that the defendant had stabbed her, though made after such an interval of time as to allow her to go from her room up-stairs into another room, was, after her death, held to be admissible as part of the *res gestæ*, she having accompanied her declaration with a request for assistance. Her declarations might have been admissible, however, upon the ground of a dying declaration; probably the latter consideration, while it is not referred to by the Court, had some influence in inducing the decision.[3]

Upon an indictment for keeping a house of ill fame, evidence of conversations held by men immediately upon coming out of the house and upon the sidewalk in front thereof, but not in the presence of the defendants nor any of the inmates, as to what had taken place within the house, was held to be inadmissible as part of the *res gestæ*, but was admissible as tending to show the character of the visitors to the house.[4] It is always a question of law for the Court or other presiding officer to decide what facts and circumstances in particular cases come within the import of the term *res gestæ*.[5]

of imminent peril, may be regarded as a part of the *res gestæ* for this purpose. *Galena and Chicago Union R. R. Co.* v. *Fay*, 16 Ills. 568.

It is only when the thing done is equivocal and it is necessary to render its meaning clear and expressive of a motive or object, that it is competent to prove declarations accompanying it as falling within the class of *res gestæ* 4 Gray, 584; 2 Stark. Cas. 241; 1 Stark Ev. 47; 1 Phil Ev. 218.

[1] *Noyes* v. *Ward*, 9 Conn. 250.

[2] Story on Bailments, Sec. 339.

[3] *Commonwealth* v. *Pike*, 3 Cush. 184.

[4] *Commonwealth* v. *Harwood*, 4 Gray, 41.

[5] It is perhaps not possible to lay down any general rule as to what is a part of the *res gestæ* which will be decisive of the question in every case in which it may be presented by the ever varying phases of human affairs. The judicial mind will be compelled frequently to apply the general principle and deduce the proper conclusion. The circumstances to which we have just adverted furnish

In order that declarations and admissions may be received in evidence as part of the *res gestæ*, they must grow out of the main transaction; but they are not necessarily confined to any particular

the tests by the light of which the question, whenever it arises, must receive its solution. 1 Wall. 642; *Bruce* v. *Hurley*, 1 Starkie, 20; *Murray* v. *Bethune*, 1 Wendell, 196; *Cox* v. *Gordon*, 2 Deveneux, 522; *Enos* v. *Tuttle*, 3 Conn. 250; *Allan* v. *Duncan*, 11 Pick. 309; *B. & W. R R. Corp.* v. *Dana*, 1 Gray, 83.

The general rule is, that declarations to become a part of the *res gestæ* must accompany the act which they are supposed to characterize, and must so harmonize as to be obviously one transaction. *Moore* v. *Meacham*, 10 N. Y. 210. I think that the declaration of the agent in relation to property intrusted to him in the usual course of business as to the reasons of the delay in the transportation, and even as to the contract made with him in reference to the carriage, admissible as a part of the *res gestæ* of the particular agency. 8 N. Y. 503.

It was very truly stated in *Pool* v. *Bridges* (4 Pick. 378), that it is difficult to lay down any precise general rule as to the cases in which declarations are admissible as part of the *res gestæ* and when they must be rejected as the mere assertions of the party. 11 Pick. 309.

It is often a difficult question to decide what declarations may or may not be admitted in evidence as part of the *res gestæ;* but the test seems to be, as laid down in 1 Stark. on Evid. 47, "If the declaration has no tendency to illustrate the question except as a mere abstract statement detached from any particular fact in dispute, and depending for its effect entirely upon the credit of the person making the declaration, it is not admissible; but if any importance can be attached to it as a circumstance deriving a degree of credit from its connection with the circumstances of the case independently of any credit to be attached to the speaker or writer, then the declaration is admissible." Thus, if the declaration is in itself a fact in the transaction, or is made by a party while doing an act, and serves to explain it, it is to be received in evidence as part of the *res gestæ.* But a recital of past transactions is not admissible, although it may have some relation to the act which the person may be doing when he makes the declaration. *Haynes* v *Rutter*, 24 Pick. 245.

The proposed evidence of the declarations of Stanwood was clearly incompetent. The declarations of a party to an act are, under proper limitations, competent evidence to show the intention of such party in reference to such act. If made at the same time with the act, they may be considered as a part of the *res gestæ*, and so admissible. Somewhat greater latitude is allowed in reference to the time of making such declarations where the question relates to the domicile of the party at a particular period. *Inhabitants of Salem* v. *Inhabitants of Lynn*, 13 Metc. 544.

The Court say: "The general rule undoubtedly is, that a party can not give in evidence his own declarations in his favor unless they accompany some act and are a part of the *res gestæ.*" *Kilburn* v. *Bennett*, 3 Metc. 201.

Shaw, Chief Justice, in delivering the opinion said: "The next question is upon the admission of several letters of the plaintiff. They were offered on the ground that they were declarations of the plaintiff accompanied with his acts of

period of time; they are, however, dependent upon the nature and character of the transaction. Perhaps the most common and by far the largest class of cases in which declarations are admissible in evidence are those in which the motive or intent of the mind with which any particular act is done is the subject. It was upon this principle that the cry of the mob was received in evidence in the trial of Lord George Gordon, who was tried for treason committed, as was charged, by levying war against the king, which consisted in fact, as alleged, in attempting to effect by force a repeal of an act of Parliament which had been passed in favor of Catholics. The prisoner presented a petition to Parliament for a repeal of the act, and in doing so he was accompanied by many thousands of people, who in loud, boisterous, and menacing manner took possession of the lobby and the avenues leading to the House of Parliament and insulted and ill treated some members of each House, and not only refused to retire, but insisted upon a repeal of the offensive act, and kept up the cry, "Repeal, repeal! No Popery!" These cries, said the Court, manifestly formed a part of the *res gestæ*, and tended to explain the purpose and intention of the multitude which had been called together by the prisoner, and were, therefore, admissible in evidence. In most cases where the state of the mind, sentiment, or disposition of a person at a particular period become pertinent topics of inquiry in course of legal proceedings, resort may be

removal from Boston to Edinburgh, addressed to his agent in the ordinary course of business, and were therefore, as *res gestæ*, good evidence of his intentions connected with those acts. The Court are of opinion that the letter of October 27, 1837, was admissible on this ground. The taxes are assessed as of 1st May, but it is well known that the assessment is made in the course of the Summer, and the tax-bills issued in September. There is no proof from the tenor of the letter or other evidence that at that time the plaintiff knew that the tax had been assessed upon him. It was written, therefore, before any controversy and before he had any interest to make evidence for himself on this subject. *Roe* v. *Arkwright*, 5 Car. & P. 575. The admissibility of the latter letters is much more questionable. The admission of declarations, either written or verbal, in connection with acts done, and giving a character to such acts, depends much on circumstances and upon the nearness or distance of the time of the declarations made to the act done. The most common instances arise in cases where certain acts done with certain intentions constitute acts of bankruptcy, and the intention is the main question; declarations of the bankrupt, verbal or written, at a near time of the act done, are admissible. *Thorndyke* v. *City of Boston*, 1 Metc. 247.

had to declarations and conversations. They seem, under such circumstances, to become a part of the *res gestæ*. An obvious instance is the case of alleged insanity.[1] For illustration: If it should become a question whether the party knew the multiplication table, it could only be established by having him repeat it. What he said, therefore, must be resorted to in order to prove his knowledge of it. The necessity of sometimes allowing this species of evidence, even in favor of the declarant, has been recognized in some of the cases.[2]

Where a witness swore that the testator had made confidential communications to him relating to the family affairs of the former, the declarations of the testator, showing that he had suspicions of the honesty of the witness, were admitted in reply. "These," said Tillman, Chief-Justice, "were acts, not hearsay; they show a want of confidence and an improbability that the family concerns of a delicate nature should have been committed to the witness."[3]

The admission of declarations, either written or verbal, in connection with acts done and in giving character to such acts, much depends upon circumstances and upon the means of information, the nearness to or distance between the act and the declaration. Thus, in an action involving the question whether the plaintiff, who had left the country with his family, was afterwards liable to be taxed at the place of his former residence, it was held that a letter written to his agent in that place expressing his intention to remain abroad permanently, was admissible in evidence, if such letter was written before he knew that a tax had been assessed upon him, though written after the assessment; but such letter would not have been admissible in evidence if written after he had gained a knowledge of the assessment of the tax.[4] The most common instance arises in cases where a certain act, being done with certain intentions, constitutes an act of insolvency or

[1] *United States* v. *Sharp*, C. C. R. 118; *The State* v. *Scott*, 1 Hawks, R. 24.

[2] *Darby's Adm. R.* v. *Rice*, 2 Nott & M'Cord, 596.

[3] *Lightner* v. *Wike*, 4 Serg. & Rawle, 283, 206, 207. So the declarations of a person sworn as a witness may be given in evidence as evincing hostile and malicious feelings toward the party against whom he testifies, with a view to shaking his credit. Note 3 Cowen & Hill's Notes to Phil. Ev. 729, 730, 764, 765, and the cases there cited.

[4] *Thorndyke* v. *City of Boston*, 1 Metc. 247.

bankruptcy. In such case the intention is the main question in issue, and the declarations of the insolvent or bankrupt, either written or verbal, and at a time near to the act done, are admissible in evidence. So, also, where a person enters upon lands in order to take advantage of the forfeiture to defeat a disseizin, to foreclose a mortgage, or the like; his declarations made at the time of the transaction, and expressive of its character, motive, or object, are regarded as verbal acts, and are admissible in evidence. The declarations of persons in possession of lands, or other property, as we have previously seen, in disparagement of the title of the declarant, are admissible in evidence.[1] Thus, upon a question whether a deceased person had a settlement, his declarations that he had no deed to the land, but that he had a writing entitling him to a deed, was admitted to rebut the presumption arising from long possession by himself and his grantee that he was seized of an estate in freehold. So declarations made by a person under whom the other party claims after the declarant has parted with his right, are not admissible to affect any one claiming under him.[2] It is otherwise, however, where the dec-

[1] *Marsh* v. *Meager*, 1 Stark. 353.

[2] Sewall, Judge, said: "The ground of admitting this evidence was, that the witness spoke to the fact that declarations had been made by the father, which declarations were inconsistent with the claim and title of the demandant, were made at a time when no controversy existed respecting the land now in question, and were made by the person occupying the land relative to the nature and extent of his occupancy and title. But no case has been found where the declarations of a supposed grantor or party in an instrument, and who may be considered as interested at the time to declare in the particular manner testified to, have been admitted even for the purpose suggested; and although we find precedents in controversies respecting last wills of declarations by the supposed testators received in evidence, yet we find no instance of the declarations of grantors in deeds admitted as evidence under circumstances in many respects similar. *Bartlet* v. *Delprat & Al.* 4 Mass. 707.

The defendant offered to prove, that before the Cayuga Reservation was purchased of the State in 1796, John Richardson told his mother that he had conveyed the premises in question to his father, William Richardson, which evidence being overruled, the defendant offered to prove the loss of the deed by proving that he could not find it on search; that he called on William Richardson, who, on search, said that he could not find it, and had given it to the defendant with the other evidences of title; and that William Richardson was old and and could not conveniently be produced; and that before Watson's judgment against J. Richardson, and before the contract on which that judgment was founded, a parol exchange had been made between J. and W. Richardson, possession taken

larations offered in evidence were made before the declarant parted with his right. Where a foundation has been laid by proof sufficient in the opinion of the Court to establish the fact of conspiracy between the parties, the acts and declarations of one of the company of conspirators in regard to the common design may be offered in evidence as tending to establish such fact, although such declarations may affect his fellows; and it is upon this principle that every one who enters into a common design is deemed, in law, a party to every act which had or may be done by others in furtherance of such common design; but in order to make such declarations evidence against any but the declarant, the common purpose or design in furtherance of the object must be established. If the declarations were not made at the time or during the pendency of the criminal enterprise, and in furtherance of its objects, and are mere narratives of past occurrences, they are not admissible against any but the declarant. Thus, the declarations of one co-trespasser where several are jointly sued together with him, may be given in evidence; but if such declarations are not part of the transaction they are designed to characterize, they should be restricted to the party making them.[1] Where conversations are proved, the effect of the evidence upon other than the declarant will depend on circumstances. The same principles apply to the acts and declarations of each partner composing the partnership; they are presumed to join or unite in the prosecution of a common enterprise, and the acts and declarations of each member in furtherance of the common object of the association, if within the scope of the partnership enterprise, is regarded in law as the act of all. Each partner, by the very act of association, is constituted the agent of the firm. While the firm exists, it speaks and acts by its members; but after the

accordingly, and the premises recognized by J. Richardson, to be the property of W. Richardson. All this evidence was overruled.

Yates, Judge, said: "The evidence was properly overruled. There can be no question that the confessions and declarations of John Richardson, and the parol exchange between him and William Richardson, could not be received as evidence of title. There was no evidence of the existence of a deed, and the declarations of the defendant and William Richardson of ineffectual searches for it could not avail in support of the defendant's claim." *Jackson* v. *Cris*, 11 John. 436, 437.

[1] *Rex* v. *Hardy*, 24 Howell's St. tr. 451, 452, 453.

dissolution[1] of the copartnership the act of an individual member ceases to have that effect unless the power is conferred upon him by the articles of copartnership; nor can one partner bind his copartners by giving a note after the dissolution of the partnership by virtue of a power to adjust the debts of the firm or to settle the partnership concerns, unless the firm, after dissolution of the partnership, consents to and ratifies the act. The burthen of proving such ratification is upon the party setting it up.[2]

[1] The judge also rightly rejected all the statements made by the witness Thurston to the plaintiffs as to the connection of E. W. Woodman with I. F. Woodman, and all inquiries made by the plaintiffs of Thurston as to the credit of said firm and the persons of whom it was composed, and also all the statements made by I. F. Woodman to Thurston and by him repeated to the plaintiffs, because no proper foundation was laid to render such evidence admissible as against E. W. Woodman. The authority of Thurston and I. F. Woodman to bind E. W. Woodman by their statements and declarations depended entirely upon the existence of the copartnership. Until that was proved, E. W. Woodman was not shown to have had any connection with either of them; and as that was the very point in controversy before the jury, and to be determined by their verdict, evidence which could be admissible only upon the assumption of the existence of the copartnership was clearly incompetent when offered to prove the fact upon which its competency depended. 1 Greenl. Ev. § 177; Collyer on Part. 454; *Tuttle* v. *Cooper*, 5 Pick. 414; *Robbins* v. *Williard*, 6 Pick. 464; *Dutton and others* v. *Woodman and another*, 9 Cush. 260.

The Court said: "The question was whether the note sued was a partnership transaction or not. If it had been proved to be a partnership transaction, then the confessions of Robbins would have been evidence; but there was no evidence of that fact, and therefore as to the note the defendants were not copartners, and the confessions of one ought not to be admitted to the prejudice of another. The witness proposed to be examined was the principal actor in the fraud complained of. To allow him to tell his own story in his own way, and to mislead the jury by an artful tale, would reflect little credit on the wisdom of the law." *Tuttle* v. *Cooper*, 5 Pick. 417.

[2] An account was made out after the dissolution of the copartnership, but in the notice of dissolution it was announced to the public that the defendant, Daniel, was authorized to adjust all accounts relating to the partnership. Without this express authority, the confession of one partner after the dissolution will take a debt out of the statute. The acknowledgment will not, of itself, be evidence of an original debt, for that would enable one party to bind the other in new contracts (*Hackley* v. *Patrick*, 3 Johns. Rep. 536); but the original debt being proved or admitted, the confession of one will bind the other so as to prevent him from availing himself of the statute of limitations. This is evident from the cases of *Whitcomb* v. *Whitney* and of *Jackson* v. *Fairbank* (Doug. 652; 2 H. Black, 340), and it results, necessarily, from the power given to adjust accounts. 6 John. 268.

In some of the cases a distinction is strongly taken, and maintained between admissions which go to establish the original existence of the debt, and those which only show that it has never been paid, but that it still remains in full force. And it is held that before the admission of a partner made after the dissolution can be received, the debt must first be proved *aliunde*.[1]

The Supreme Court of Massachusetts held that the confessions of one partner, made after the dissolution of a partnership, in relation to a demand against the partnership not barred by the statute of limitation, are admissible, though not conclusive evidence against the other partner; the joint liability being first proved *aliunde*.[2] A brief reference to another question will

It has been repeatedly held in this Court, that though one partner after the dissolution can not bind the other by any new contract, yet his acknowledgment of a previous debt, due from the partnership, will bind the other partner so far as to prevent him from availing himself of the statute of limitations. It is admissible to repel the presumption of payment of a debt which is shown to have once existed against the firm, although not competent to create a new debt. *Hubbard* v. *Elmer*, 7 Wend. 446; *Lust* v. *Smith*, 8 Barb. 570.

[1] *Owings* v. *Law*, 3 Gill & John. 134–144; *Shelton* v. *Cocke*, 3 Munf. 197.

[2] The other questions raised on this report I shall very briefly notice. It was objected that the declarations of Shepherd made after the dissolution of the co-partnership, relating to the performance of the contract on the part of the plaintiff, ought not to have been admitted as competent evidence. On this point there are many conflicting decisions, to which, however, I do not think it necessary particularly to advert. The rule is, we think, correctly laid down by Mansfield, C. J., in the case of *Wood et al.* v. *Braddick*, 1 Taunt. 103: "The admission of one partner, made after the partnership has ceased, is not evidence to charge the other in any transaction which has occurred since their separation; but the power of partners, with respect to rights created pending the partnership, remains after dissolution." This rule of law has been frequently recognized with unqualified approbation (*Lacy* v. *M'Neal*, 4 Dowl. & Ryl. 7; Gow. on Partio. 90), and is, I think, the settled law of England at the present day, notwithstanding the contradictory opinions which have since prevailed in relation to the admissions made by a partner as to debts barred by the statute of limitations. And, but for these conflicting opinions, the rule in the leading case of *Wood et al.* v. *Braddick* would not, I apprehend, have been ever questioned. But these conflicting opinions do not, that I can perceive, at all affect the rule in question, in relation to the outstanding subsisting demands against partners, or joint promisors, which are not barred by the statute. Those who hold that the promise or acknowledgment of one of two partners or joint promisors is not sufficient to take a case out of the statute, assume the principle that such a new promise or acknowledgment is a new and independent cause of action, and this

close the consideration of hearsay evidence. That is, the admission of a party's own books of account in evidence, in proof of the delivery of goods therein charged, the entries having been made either by the party himself or by his clerk, who is since deceased. In order to the admission of this character of evidence, the books must have been kept for that purpose, and the entries must have been made by the person whose duty it was for the time being to make such entries; and they must have been made contemporaneous with the sale of the goods, so as to indicate that they constitute a part of the transaction; but even then the books are not admissible, where, from the nature of the transaction it is evident that better evidence is attainable.

principle being conceded, the conclusion drawn from it is just; but it does not impugn the rule in question, which we consider well established by a series of judicial decisions, and is certainly the law of this commonwealth. 17 Mass. R. 222; 2 Pick. 581; *White* v. *Hall*, 3 Pick. 291; 5 Pick. 414; *Hathaway* v. *Haskell*, 9 Pick. 42. This rule, however, is denied, and contrary doctrine is advanced by Spencer, C. J., in the case of *Walden* v. *Sherbourne et al.* 15 John. R. 409. He maintains that one partner can not after a dissolution bind his copartner by acknowledging an account, any more than he can give a promissory note to bind him; and he thinks there is more safety in this doctrine than in the contrary one. Undoubtedly it may be more safe for the fraudulent debtor, but it is less just to the honest creditor. With great deference, therefore, to that eminent judge for whose opinions I entertain the highest respect, I can not but think that the rule laid down in the case of *Wood et al.* v. *Braddick* is a sufficiently safe rule of evidence, and well adapted to the discovery of truth, and the due administration of justice. Indeed the rule in connection with the legal remedy on joint contracts, seems not only proper, but indispensable. The dissolution of a partnership does not discharge the partners from their liability on contracts made during the continuance of the partnership. All must be sued; and a separate recovery can not be had against any one of the partners. In respect, therefore, to such contracts and liabilities it is immaterial whether the confessions of any one of the partners was made before or after the dissolution. Whether the other partners are necessarily and conclusively bound by such confessions is a different question. Doubtless they may disprove the truth of such confessions; they may prove payment, or any other discharge of the claim, or that the contract or claim had never any legal validity. But that the confessions of any one of the defendants in an action against several on a joint contract may be given in evidence against them, the joint contract being first proved *aliunde*, can not, we think, be reasonably doubted. See *Parker* v. *Merril*, 6 Greenl. 41; *Baker* v. *Stackpoole*, 9 Cowen, 433; *Hopkins* v. *Banks*, 7 Cowen, 650; *Story* v. *Barrell*, 2 Connect. R. 665; *Pritchard* v. *Draper*, 1 Russ. & Mylne, 191; *Stead* v. *Salt*, 10 Moore, 393; *Brisban* v. *Boyd*, 4 Paige, 17; *Bridge* v. *Gray*, 14 Pick. 55; *Vinal* v. *Burrill*, 16 Pick. 401; 11 Pick. 407.

The rules of the several States in regard to the admission of this character of evidence are not entirely uniform. Some of the States require ancillary proof that they are the books of original entry of the party offering them, that the entries were made about the time that they purport to be made, that the parties making the entries did not keep a clerk whose duty it was to make such entries, and that he has settled with different parties out of the books, and that his books, as shown by the evidence of the parties settling with him, are true and correct. Others of the States allow the party to swear to the correctness of his books. Where the entries are made by a clerk, such clerk must be produced to prove the correctness of the entries; or, if the clerk be dead, then proof of his handwriting, accompanied with preliminary proof as above stated, will be sufficient to admit them in evidence.

CHAPTER XV.

THE BURDEN OF PROOF.

THE party affirming any fact is ordinarily bound to assume the burden of proof. It is, therefore, sufficient, where the allegation is affirmative, to oppose it with a denial, unless the facts in the case are of such a nature as to require the defendant to admit the allegation, and to avoid the effect of it by the statement of some other affirmative fact. This rule is in harmony with the old Roman maxim, *ei incumbit probatio qui dicit non qui negat*, that is, that the proof lies upon him who accuses, not on him who denies; as in the nature of things the fact of denial is no evidence. As a consequence of this rule the party who asserts the affirmative of a fact, whether plaintiff or defendant, is entitled to begin with his evidence; where new matter has been introduced by either party, the party holding the affirmative is legally entitled to reply to such new matter; but the party holding the affirmative is not permitted to go into half of his case in chief, and to reserve the other half until the other party has introduced his evidence, but he is regularly required to develop his whole case in chief before the other party is required to begin. In determining who should regularly begin and reply, regard is had to the substance and effect of the controversy, rather than to the

form of it. This rule, however, has but slight application to proceedings in a Church trial or investigation, for the reason that there are no written pleadings required, making up a formal issue, such as are used in courts of record. Yet while there are no technical written pleadings, except the complaint required, the principle applies equally in a Church trial or investigation, that the burden of proof devolves upon the party holding the affirmative. It may sometimes happen that the accused may take upon himself, after admitting the *prima facie* case made against him, this burden, by attempting to justify and explain away the force and legal effect of the charges and specifications. If the complaint contains several charges and several different specifications, some of which the accused justifies, and others of which he denies, the prosecution, under such circumstances, holds the affirmative, and is entitled to begin. Thus, if the charges against the accused are for slander or libel, and also for profanity, and the accused justifies the slander or libel, but pleads not guilty to the profanity, the prosecution having the right to prove the defendant guilty of all offenses charged, and to make out and establish each specification, embodied in the complaint, has the right to begin and is entitled to reply. How far the prosecution shall be permitted to proceed in proof, in anticipation of the defense, is regulated by the discretion of the judge, preacher in charge, or other presiding officer, according to the circumstances of the case, regard being usually had to the question, whether the whole defense is so far indicated by the accused with sufficient certainty to render the prosecutor's evidence intelligible. In a trial or investigation before a conference, or a committee of the Church, the prosecution should produce all the affirmative evidence on which it means to rely before the accused is called upon to make his defense; and, if the complaint embraces several independent charges, or specifications, or both, the prosecution should, in the first instance, regularly introduce its evidence in support of all of them. But where there are several specifications, founded upon the same charge, inserted in the complaint with an alternative view of having the specification and the evidence conform, the prosecution may convict under one of the specifications, although he can not upon another, and although the proof of one disproves the other. The prosecution may, in the first instance,

produce his evidence in support of one only, and if upon the defendant's evidence to disprove such charges, or the plaintiff's evidence, offered by way of rebuttal, the prosecution fails to support the specification under which the plaintiff's evidence was offered, but does support another specification, the accused may be convicted upon the latter specification.[1]

It would seem that where it appears by a written stipulation by the admission of the party or his counsel, that the facts charged in the complaint are admitted, so that there is no dispute about them, but the defense relies upon affirmative matter as a justification or excuse, under such circumstances the defendant will have the right to begin and reply; even if the defendant has filed a formal denial, he may still at the hearing secure the advantage of beginning and replying by withdrawing such denial, or by admitting the whole of the charges contained in the complaint. And the defendant may, in some cases, by admitting the gravamen of the complaint, secure to himself this advantage without admitting all of the aggravating circumstances charged. Thus, in an action of trespass for breaking the plaintiff's close, the defendant pleaded not guilty as to the force and arms, and whatever is against the peace, and justified as to the residue, and the damages were laid only in the usual form of treading down the grass, and subverting the soil. The defendant was permitted to begin and reply, there being no necessity for the introduction of any proof on the part of the plaintiff. The true test to be observed in determining which party has the right to begin, and, of course, in determining where the burden of proof rests, is to consider which party would be entitled to the verdict or judgment if no evidence was offered on either side, for the burden of proof lies on the party upon whom in such case the verdict ought to be given.[2] There is, however, a difficulty in determining who should begin and reply, arising in a class of

[1] Undoubtedly an orderly course of proceeding at trials is necessary to the attainment of the purposes of justice; and, as a general rule, it is proper that a plaintiff who has the affirmative should produce all the evidence, which he means to rely upon in the first instance, and if he has included in one suit several distinct substantive and independent demands, he should introduce his evidence as to all demands, before the defendant is called upon to answer. *Jones* v. *Kennedy*, 11 Pick. 131.

[2] *Leet* v. *Gresham Life Insurance Company*, 7 Eng. Law & Eq. R. 578.

cases in our civil courts which deserves only a passing notice here, as they can seldom arise in a Church investigation. Thus, where the action is for unliquidated damages, such as libel, slander, malicious prosecution, or personal injury, and the defendant has met the whole case with an affirmative plea, the practice has not been uniform; in some of the cases it has been held that the plaintiff shall, notwithstanding, have the privilege of beginning and replying, although the action stands admitted on the record, and the affirmative and burden of proof is on the defendant. In other cases it has been regarded as resting in the discretion of the Court, under all the circumstances of the case. But the weight of authority seems to be in favor of giving the opening and close of the case to the plaintiff, where the damages are unliquidated and do not rest in computation alone.[1]

In proceedings before an ecclesiastical tribunal, where the

[1] On the point raised in this case, which is matter of practice only, we are all clear that the course of argument prescribed at the trial was right. The general rule is, that the plaintiff who has the burden of proof shall have the general reply or closing argument. There has been an exception in our practice only where the plaintiff, by his plea, admits the whole cause of action stated in the declaration, and undertakes to remove or defeat it by the matter set up in his bar. The cases have usually been trespass, where the defendant acknowledges the act and claims in his plea the soil and freehold in himself or some one under whom he acts as a servant, or by license; slander, in which a justification only is pleaded; and debt or obligation, where the contract is admitted, but some matter of defeasance or discharge is pleaded. There are other cases depending upon the same principle; that is, where, by the pleadings, nothing essential to the action is left for the plaintiff to prove, and where the finding of the issue for the defendant depends upon affirmative proof by him. In all such cases, however, if the defendant pleads the general issue also, the right of reply has been accorded to the plaintiff, even if, on trial, the defendant waives any proof on the part of the plaintiff to maintain that issue. This having been the uniform practice, according to the recollection of all of us, it is best to adhere to it, although, in other cases, and in such as is before us where the plaintiff was saved the trouble of proof to make out his case by the admission of the necessary facts, the reason may be quite as strong for giving this privilege to the defendant. The right of closing a cause is not very essential to the procurement of a right verdict if the judge who presides is cautious in summing up the evidence. If, as in a neighboring State, the Court were mere silent spectators of forms, without the right of charging the jury, the privilege of closing would be more worth contending for than with us, where the judge has the last word instead of the counsel. *Ayer* v. *Austin*, 6 Pick. 225; *Laken* v. *Higgins*, 3 Stark. 178; *Robey* v. *Howard*, 2 Stark. 555; *Young* v. *Baimer*, 1 Esk. 103; *Comstock* v. *Hadley*, 8 Conn. 261.

onus probandi is not technically presented, such tribunals usually adopt the same principles which govern in proceedings according to the course of the common law. Thus, in the probate of a will before an ecclesiastical court in England, it was held, that on an issue as to whether the will was valid or invalid, the executor was entitled to the affirmative. So where the question was as to the state of the testator's mind at the time of the execution of the will, upon an appeal from the decree of judge of probate allowing or rejecting the will, it was held that the party offering the will in the appellate court is required to produce the attesting witness to show the soundness of the testator's mind at the time of the execution of the will,[1] and consequently the executor

[1] But we are by no means satisfied that in relation to wills there is any legal presumption in this commonwealth of the sanity of the testator. If such presumption exists, no proof that the testator was of sound mind would be necessary until those opposing the will had offered some evidence to impeach it. The presumption of sanity would be sufficient until there was something to meet it. Yet our cases uniformly hold, that the party seeking probate of the will must produce the attesting witness to show not merely the execution of the instrument, but the sanity of the testator at the time of its execution. *Phelps* v. *Hartwell; Blaney* v. *Sargeant; Barrett* v. *Brooks*, above cited, 7 Pick. 94; 1 Mass. 71; 1 Mass. 335; *Buckminster* v. *Perry*, 4 Mass. 593. And such has been, we think, the uniform practice in the Probate Courts, and in this Court sitting as the Supreme Court of Probate. These cases were decided, and this practice grew up, under the explicit language of the St. of 1783, c. 24, § 1, which provided that "every person lawfully seized of any lands, etc., of the age of twenty-one years and upward, and of sane mind, shall have power to give, dispose of, and devise the same." The language of the revised statute is to the same effect: "Every person of full age and of sane mind." Rev. Sts. c. 62, §§ 1, 5. There are strong reasons why the same presumption as to sanity should not attach to wills as to deeds and ordinary contracts. Wills are supposed to be made *in extremis*. In point of fact, a large proportion of them are made when the mind is, to some extent, enfeebled by sickness or old age. It is for this reason that the execution of the will and the proof of its execution are invested with more solemnity, the statute requiring it to be attested by three or more competent witnesses; making void all beneficial devises, legacies, or gifts to such subscribing witnesses; and requiring the presence of the three in the Probate Court for its proof, unless it appears by consent in writing of the heirs at law, or other satisfactory evidence, that no person interested intends to object to the probate of the will. Rev. Sts. c. 62, §§ 6, 8, 15. We speak of what seems to be the rule in this commonwealth under the St. of 1783, c. 24, and the Rev. Sts. c. 62. There is, no doubt, both conflict and confusion in the authorities on this point, both in England and in this country. A general legal presumption doubtless exists that a man is sane till there is evidence to the contrary, and upon

or other person producing the will holds the affirmative,[1] and therefore is entitled to open and close the case without reference to the question of sanity or insanity of the testator.[2]

proof of the execution of a contract, or of a deed, no proof need be given that the maker was of sound mind when he executed it. The presumption is sufficient until evidence is produced to meet it. This presumption has often been applied to the proof of wills, but not in our own court; nor is the rule elsewhere uniform. In the case of *Gerrish* v. *Nason*, 22 Maine, 441, the Court say: "The presumption that the person making the will was at the time sane is not the same as in the case of the making of other instruments, but the sanity must be proved." In *Comstock* v. *Hadlynn*, 8 Conn. 261, the Court say: "Those who claim under the will must take upon themselves the burden of proof; and they must not only prove that the will was formally executed, but that the testator was of sound and disposing mind." In the recent case of *Barry* v. *Butlin*, before the judicial committee of the privy council, Mr. Baron Parke, in pronouncing the judgment, says: "The rules of law according to which cases of this kind are to be decided, do not admit of any dispute so far as they are necessary to the determination of the present appeal, and they have been acquiesced in on both sides. These rules are two: the first, that the *onus probandi* lies in every case upon the party propounding a will, and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator." 1 Curt. Eccl. 638; 2 Gray, 532, *et seq.*

[1] Dana, Chief-Justice, Strong and Thacher, Judges, were against admitting the evidence on the ground that it was a bare opinion concerning the point as to whether the testator was of sound disposing mind and memory or not. Sedgwick, Judge, in delivering the opinion of the Court in the case of *Phelps et al.* v. *Hartwell et al.* 1 Mass. 70, says, that in the case this counsel for the appellees contended that the burden of proof was with the appellants, and that it was incumbent on them to show that the testator was not of sound mind at the time of making the will, and for this was cited Godol. 24, in which it is said that proof of insanity must be made by those who object to the instrument offered as a will. But the whole Court held, that the rule was the same in this case as in all others. The burden of proof is always with those who take the affirmative in pleading. Here the appellees have the affirmative, and must, therefore, produce reasonable and satisfactory evidence to the jury that the testator was sane at the time of making his will; and the jury will confine themselves in their inquiry into the facts as to the state of the testator's mind at that time. Powell on Devises, and the case of *Hodgdon* v. *Wallis* there cited. See also Fonbl. Eq. p. 65, note x.

[2] Thomas, Judge, in delivering the opinion of the Court in the case of *Crowninshield et al.* v *Crowninshield* (2 Gray, 529), says: "We can perceive here no shifting of the burden of proof; the issue throughout was but one: Was the testator of sound mind? and the affirmative of this was upon the party offering the will for probate. Again: that issue is an issue of fact, and is to the jury; and how is the Court to determine when the will is 'proved,' or 'sufficiently proved,' by the subscribing witnesses, 'so that the burden of proof shifts from the executor to the heir?' It is a question of the effect of evidence, and could

There are some exceptions to the rule, that the party holding the affirmative has devolved upon him the burden of proof. There are certain propositions, though negative in their terms, which must be proved by the party who affirms them. This class of exceptions includes cases where the plaintiff grounds his right of action, or the defendant's liability upon a negative statement of facts which is an essential element in his case. . Thus, in an action for malicious prosecution, one of the material and essential averments is a want of probable cause, and in order to entitle the plaintiff to maintain the action, he must prove this negative proposition. So in a prosecution founded upon a penal statute, in defining the offense which contains a negative, the complaint must contain such negative, and also it must be supported by affirmative proof on the part of the plaintiff. It is obvious, however, that where negative evidence is required, which from its very nature is more difficult to make out than affirmative proof, it will ordinarily be considered sufficient if the party affirming such evidence, as in the absence of countervailing tes-

only be solved by probing the mind of each juror. Suppose the attesting witnesses are divided in opinion—one for the sanity of the testator, one against, the other doubtful—or that two testify against the sanity of the testator and the third that he was of sound mind, and the jury place greater confidence in the means of observation, intelligence, judgment, and integrity of the one than of the other two; or that all three testify (a case not without precedent), so far as it is matter of opinion, in favor of the sanity of the testator, yet, in view of all the facts and the circumstances detailed by the same witnesses, the jury reach a very different conclusion. If there could be a shifting of the burden upon a single issue, it would be impossible to tell when the burden is to be transferred from the one party to the other. It is quite difficult to understand what was meant by the Court when they said that 'if he (the executor) makes out his case by the statute evidence he has only to defend against the proof of insanity produced by the other party.' The law has made no further distinction between the attesting and other witnesses than that the opinions of the former may be given in evidence, and even this distinction does not extend to professional witnesses. If the three attesting witnesses, being comparative strangers to the testator, and called in for the mere purpose of witnessing the will, testify that, so far as they saw, the testator was of sound mind, and the attending physicians, familiar with the facts and with the history of the party, testify that he was insane, the law attaches no peculiar weight to the testimony of the former as against the latter. Still less does it give it any such preponderance as to shift the burden of proof. The issue after the evidence is all in is precisely the same that it was at the beginning—Was the testator of sound mind?—an issue in its very nature incapable of division."

timony, would afford ground in general for presuming that the allegation is true.[1] Where, however, the facts of the negative averment rest peculiarly within the knowledge of the other party, no evidence is required in support of such negative averment, and the averment is taken as true unless disproved by the defendant. Thus, upon an indictment for selling intoxicating liquors without a license, the burden of proving the license for the sale of the liquor is expressly devolved upon the person selling it.[2] Where the negative allegation involves a charge of criminal neglect of duty, whether official or otherwise, the party making the allegation must prove it, for the presumption of law in cases of this character is in favor of innocence. Thus, on an information against Lord Halifax for refusing to deliver up the rolls of the exchequer in violation of his duty, the prosecutor was required to prove the negative. So in an action against an officer for failing to attach property, as the property of the debtor, the burden of proof that the property was the property of the defendant, and liable to attachment, was held to be upon the plaintiff.[3] An exception to this rule is admitted in Chancery, in the case of an attorney and client, it being a rule that where the relation of attorney and client is once established, and the attorney deals with the client during the existence of such relation, the *onus* is upon him of proving that no advantage was taken of the latter.[4] In a suit by the holder of a promissory note or bill of ex-

[1] A party is not required to make plenary proof of a negative averment. It is enough that he introduces such evidence as in the absence of all counter testimony will afford reasonable grounds for presuming that the allegation is true; and when this is done the *onus probandi* will be thrown on his adversary. *Graves* v. *Bruen et al.* 11 Ill. 441; *Calder* v. *Rutherford*, 3 B. & B. 7 Morse, 158.

[2] *Per Curiam.* It seems to us that the indictment is sufficient. The allegation that the defendant is presumed to be a common seller by retail is enough, without alleging that the quantity was less than twenty-eight gallons. That may be deemed the legislative definition of the term retail, and it is matter of evidence for the defendant to show that the quantities which he sold were not less. *Commonwealth* v. *Peter Eaton*, 9 Pick. 166.

Rex v. *Smith*, 3 Burr. 475; *King* v. *Turner*, 5 M. & Selw. 209; *Apothecaries Co.* v. *Bentley*, 1 Ryan & Moody, 159; *Commonwealth* v. *Samel*, 2 Pick. 103; *Gening* v. *The State*, 1 M'Cord 573.

[3] *Phelps* v. *Cutter*, 4 Gray, 139.

[4] The issue was whether the defendant had neglected his duty as an officer in not attaching personal property as the property of Hallowell, the debtor, and this

change, which has been stolen or which has otherwise been fraudulently put in circulation, the burden is on the plaintiff to prove that he came fairly into the possession[1] of it, under such circum-

involved the other question whether the chattels specified were at the time the property of Hallowell, or so far his property as to be liable to attachment for his debts. On this the plaintiff had the burden of proof. *Phelps* v. *Cutter*, 4 Gray, 139. Bigelow, J. "This case presents a simple question as to the burden of proof. Ordinarily in an action of *indebitatus assumpsit* for goods sold, proof of the sale and delivery of the articles to the defendant make out a *prima facie* case, and entitles the plaintiff to recover, unless evidence is offered by the defendant to control it. But in the case at bar the plaintiff coupled the proof of the sale and delivery with an admission that it was a sale on credit. Having made this admission, he could not recover until he had shown that the term of credit had expired. This was in the nature of a condition precedent to his right to maintain his action, and upon the most familiar principles of evidence, the burden was on him to prove its fulfillment." *Morrison* v. *Clark*, 7 Cush. 214; 1 Story's *Eq. Jr.* 311; *Gibson* v. *Jeyes*, 6 Ves. 278. *Kane* v. *Ld. Allen*, 2 Dowell, 289.

[1] Wilde, J., delivered the opinion of the Court. "We all agree that a new trial in this case must be granted, for the purpose of allowing the defendants to prove, if they can, that there was fraud practiced in the inception of the note, or that it was fraudulently put in circulation. This fact being established will throw upon the plaintiff the burden of proof to show that he came by the possession of the note fairly, and without any knowledge of the fraud." *Munroe* v. *Cooper*, 5 Pick. 413.

Erskine and Peggot showed cause. They admitted from *Miller* v. *Race*, 1 Burr. 452; *Grant* v. *Vaughan*, 3 Burr. 1516; *Peacock* v. *Rhodes*, Dougl. 633, and other cases, that *prima facie* the bearer of a bank-note was entitled to receive the money merely on the score of his possession, and that no other person was entitled to the note, unless he were also entitled to the money; and that whoever impeaches his title must take the burden of proof upon himself. But the principle of all the cases was, that the party standing upon his possession was a *bona fide* holder for a valuable consideration; and therefore the case did not apply to establish this plaintiff's right, who appeared upon the evidence, not to be a holder for a valuable consideration before notice. It appears plainly from the letters that on the 2d of February, 1790, when he was informed by the bank of all the facts relative to the note, he had not then advanced any consideration for it to his correspondents, from whom he only received it on the 27th of January preceding, and who then informed him that they should draw upon him for the amount at some future period. It is as plain that on the 11th of April he had not advanced any thing on the note; for they wrote to desire him, either to pay the money or return the note. If after notice he thought proper to pay the money, the most he can claim is to stand in the shoes of Hynem and Hendricks from whom he received it. Now, as to them, sufficient evidence was given to call on them to show more especially how they came by it. *Solomon* v. *The Bank of England*, 13 East, 136.

stances as entitled him to recover. The burden of proving good faith, however, is all the burden which the law imposes upon him.[1]

The burden of proof, and the weight of evidence are in their nature very distinct; the former remains on the party affirming a fact in support of his case, and does not change in any aspect of the case;[2] the latter shifts from side to side in the progress

[1] It was once held that in the case of a bill of exchange or promissory note, fraudulently put into circulation, the holder must show that he had used due and reasonable caution in taking it. But it has since been definitely adjudged that if he took it in good faith, he is entitled to recover on it, and that even gross negligence in him is not tantamount to fraud, although it may be given in evidence to a jury, as tending to prove fraud. The burden of proving good faith is all the burden which the law imposes on him. *Goodman* v. *Harvey*, 4 Adolph & El. 870, and 6 Nev. & Man. 372; *Uthen* v. *Rich*, 10 Adolph. & El. 790, and 2 P. & Dav. 385; 2 Greenl. Ev. § 639; 3 Kent Com. 7th Ed. 98 note; Chit. on Bills, 10 Amer. Ed. 257; Byles on Bills, 2d Amer. Ed. 143, 148. In *Arbouin* v. *Anderson*, 1 Adolph. & El. N. R. 504, Lord Denman says: "Acting upon the case of *Goodman* v. *Harvey*, which gives the law now prevailing on this subject, we must hold that the owner of a bill" (of exchange) "is entitled to recover upon it, if he has come honestly by it, and that that fact is implied *prima facie* by possession; and that to meet the inference so raised, fraud, felony, or some such matter must be proved." 10 Cush. 491.

[2] Fletcher, J. "The counsel for the defendant seems to have understood the rule of the Court of Common Pleas as giving him a right to open and close, upon admitting merely a *prima facie* case on the part of the plaintiff. Upon this construction, the defendant might have the right to open and close while the burden of proof would be all the time on the plaintiff. As, for instance, in a suit on a promissory note by merely admitting the signature the defendant would give the plaintiff a *prima facie* case. The defendant might then set up a want of consideration in defense, and introduce evidence to overcome the *prima facie* case of the plaintiff; the plaintiff might then introduce evidence to strengthen his *prima facie* case, and the weight of evidence would be shifting from time to time, but the burden of proof would lie on the plaintiff all the way through. It would be wholly unreasonable, that the defendant in such case should have the right to open and close." 8 Cush. 605, 606. The last question in the case is whether the jury ought to have been instructed "that the burden was on the plaintiffs to prove that the loss accrued in some other way than from cotton waste." And this question is virtually decided by the decision, that the words, "on condition that the applicants take all risk from cotton waste," have not the effect of an exception, but of a proviso; namely, to defeat the defendant's promise conditionally, and avoid it by way of defeasance or excuse. It is a familiar doctrine, that the party for whom matter of excuse is furnished, whether by statute or by agreement, must bring it forward in his defense, and support it by evidence. *Coffin* v. *Denham*, 8 Cush. 404.

of a trial according to the nature and strength of the proof which is brought forward and offered in support or denial of the main fact to be established.[1]

CHAPTER XVI.

THE BEST EVIDENCE TO BE GIVEN.

THE law requires the highest proof of which the nature of the thing is capable always to be given, and excludes such evidence of facts as, from the nature of the thing, supposes still better evidence behind in the party's possession or power. The principle of the rule is founded upon the presumption that there is something in the better evidence which is withheld that militates against the party resorting to inferior evidence. This presumption may not be very strong, yet the general effect of it is to secure fairness and prevent fraud. The rule is satisfied by the production of the best evidence that is attainable and that is applicable to each particular fact. The scope of it is to exclude evidence of a nature merely substitutionary, when primary evidence is attainable. Thus, if a party offers a copy of a deed or other writing where he ought to produce the original, this raises a presumption, more or less violent, that there is something in the original deed or writing which would militate against the party offering it if produced, and for that reason, if for no other, a copy is not ordinarily admissible in evidence. But if the party desiring to use the copy prove that the original deed or other writing is in the possession or under the control of the adverse party, who refuses to produce it upon regular notice, or if the original has been lost or destroyed without his fault, no such presumption can obtain, and a duly authenticated copy will be admissible in evidence.[2] Where there is no substitution of evidence

[1] Bigelow, J. "It was incumbent on the plaintiffs to prove a liability on the part of the defendant to pay the tolls which they sought to recover in this action. For this purpose they relied on the implied assumpsit arising from proof that the defendant had passed their bridge without paying the usual tolls. This made out a *prima facie* case, and would entitle them to recover, unless the defendant offered some evidence to rebut it. But it does not follow that the burden of proof was thereby shifted. *Central Bridge Corporation* v. *Butler*, 2 Gray, 131.

[2] As to the copy of the mortgage deed, the general rule is that a copy shall not be permitted to be given in evidence without first proving the loss or destruc-

the rule is not infringed even though there be a selection of weaker or stronger proof, or an omission to supply all the proofs, capable of being produced. Thus, if a deed be attested by two or more subscribing witnesses, the execution of the deed may be proved by one of them.[1] So, also, a defendant may give evidence of an admission by the plaintiff that the plaintiff's claim is satisfied even though it should appear that the plaintiff signed a receipt. Upon the same principle the execution of a will or other written instrument attested by two subscribing witnesses, may be proved, where there is no statute to the contrary, by one of them.[2] Neither is it necessary to call the supposed

tion of the original. Here no proof was produced of any such loss, nor are there any facts in the case from which it can be inferred. The mortgagee never entered, nor any one deriving title from him, before the commencement of the present action; for as will be seen presently, the deed to Wood was imperative, and therefore his entry, and the tenants after him, were unlawful. No attempt has been made to foreclose. The note referred to in the mortgage deed has not been produced, nor has any evidence been given respecting it. There was no evidence of any demand or payment of interest, which might have been expected had there been a subsisting debt during the lives of the parties. For aught that appears, the note might have been punctually paid. The copy of a mortgage deed accompanied by such circumstances can have no weight in the scale of evidence, and ought not to be admitted. *Andrews & ux.* v. *Hooper*, 13 Mass. 475.

[1] If the witnesses were within the commonwealth, proof of the execution by one of them would entitle the party to read his deed to the jury; and the like rule applies as to the handwriting where both are shown to be out of the jurisdiction of the court. In ordinary cases, where the mere formal execution is the subject of inquiry, it is quite sufficient to produce one of several subscribing witnesses, and if the secondary evidence is admissible, it is sufficient to prove the handwriting of one of the attesting witnesses, it being always necessary, if there be more than one attesting witness, that the absence of them all should be satisfactorily accounted for in order to let in the secondary evidence. 1 Greenl. Ev. §§ 574, 575; *Cunliffe* v. *Sefton*, 2 East, 183; *Adam* v. *Kerr*, 1 Bos. & Pul, 360; *Jackson* v. *Burton*, 11 Johns. 64; *Dudley* v. *Sumner*, 5 Mass. 438; *Gelott* v. *Goodspeed*, 8 Cush. 412.

Ordinarily it is quite sufficient to call one of several subscribing witnesses to a deed to prove its execution sufficiently to authorize the reading of it to the jury. *White and others* v. *Wood and others*, 8 Cush. 414.

[2] With regard to the second exception to the sufficiency of the proof of this codicil, it can only be necessary to resort to adjudged cases as they seem conclusive to this point. There were two witnesses to this codicil, to wit, Thompson Mason and M'Carty. M'Carty only was sworn, and the probate upon which it was ordered to be recorded imports that the two codicils were proved by the oath of Daniel M'Carty. In the case of *Harper et al.* v. *Wilson et al.* decided in the

writer himself to prove his handwriting; it may be proved by any witness who is acquainted with it. In prosecutions where it is necessary to prove that the act for which the prisoner is indicted was done without the consent or against the will of some other person, it is not in general necessary to call such person as a witness in order to prove the negative, but such fact may be proved by any person who is conversant with the will or motive of such person. This rule, that primary evidence, or the best evidence, as it is termed, must be adduced, is subject to general exceptions where the public convenience requires it. Thus, for example, where the inquiry arises collaterally between third persons that an individual has acted notoriously as a public officer, and his acts have been acquiesced in by the public, is *prima facie* evidence of his official character without producing his commission or appointment. This rule, however, does not obtain where the officer himself attempts to justify commission of an act complained of which purported to be done by him in his official capacity, for there it is necessary that he should show in his defense not only that he was an acting officer, but that he was an officer *de jure;* that is, that he was an officer in truth and in right, duly commissioned and qualified as such.[1] The reason

Court of Appeals of the State of Kentucky, in 1820 (2 A. K. Marsh, 465), in which the right to lands was in controversy, the probate was in these words: "This will was produced in court, proved by the oath of Sarah Harper, a subscribing witness thereto, and ordered to be recorded." There was another subscribing witness to the will, and exception was taken to the sufficiency of the proof. The language of the Court in that case was, "As to the proof of the execution of the will it need only be remarked, that its admission to record is sufficient to show that the witness by whom it was proven in that court established every fact essential to its due execution; and it is a settled rule, that although more than one witness is required to subscribe a will disposing of lands, the evidence of one may be sufficient to prove it." 2 Marshall, 467. The same doctrine has been since fully recognized in the case of *Turner* v. *Turner*, 1 Litt. Rep. 103, adjudged in the same court in 1822, and the identity of the certificate and facts in this case with those in the case of *Harper* v. *Wilson* leaves nothing for this Court to deliberate upon. *Davis* v. *Mason*, 7 Curtis, 684.

[1] The general rule of law is, when an officer justifies an act complained of purporting to be done in his official capacity, that it is necessary that he should aver and prove in his defense not only that he was an acting officer, but that he was an officer in truth and right, duly commissioned and qualified to act as such; while as to all others, it is sufficient for them to aver and prove that he was acting as such officer. *Schlencker et al.* v. *Risley*, 3 Scam. 485.

of the rule is, that the officer himself is bound to know whether he is legally an officer; and if he attempts to exercise the duties of an office without authority, he acts at his peril. Whereas it is sufficient, so far as the rights of third persons or the public are concerned, that the officer is acting in his official capacity, for it would be unreasonable and oppressive to compel them, before they put faith in his official acts, to go into a minute examination of all the evidence of his title to the office, and see and determine that he has complied with all the necessary forms of law.[1]

The cases which most frequently call for the application of the rule that the best evidence must be produced, is where oral evidence is offered instead of written evidence. These may be classified under three heads: first, those instruments which the law requires, in order to their validity, should be in writing;

[1] Breese, Judge: "There are two manifest objections to the third plea. The first is, the defendant does not allege he was duly elected and qualified to the office under which he justifies the trespass. The rule is, where an officer himself attempts to justify his acts done by virtue of his office, he must allege and prove himself an officer *de jure*. *Schlencker* v. *Risley*, 3 Scam. R. 483. We know of no different rule anywhere, and the reason is, that being the party exercising the office, his right to do so, or the evidence of it, is in his own possession and power. *Case* v. *Hall*, 21 Ills. 635.

If the commissioners of highways acted without taking the oath required by law, they were liable to a penalty; or the town, upon their default in complying with the requisition of the statute, might have proceeded to a new choice of commissioners. But if the town did not (and it does not appear that they did in this case), the subsequent acts of the commissioners, as such, were valid as far as the rights of third persons and of the public were concerned in them. They were commissioners *de facto*, since they come to their office by color of title; and it is a well settled principle of law, that the acts of such persons are valid when they concern the public or the rights of third persons who have an interest in the act done, and this rule is adopted to prevent the failure of justice. The limitation to this rule is as to such acts as are arbitrary and voluntary and do not affect the public utility. The doctrine on this subject is to be found at large in the case of *The King* v. *Lisle* (Andrews, 263). It certainly did not lie with the defendant as a mere ministerial officer to adjudge the act of the commissioners null. It was his duty to record the paper *valeat quantum valere potest.* It was enough for him that those persons had been duly elected commissioners within the year, and were in the actual exercise of the office. It may be that the oath was duly taken, and that the omission to fill the certificate of it was owing to casualty or mistake. The validity of the title of the commissioners to their office must not be determined in this collateral way. *The People* v. *Collins*, 7 John. 553.

second, those which the parties themselves have reduced to writing; and third, all other writings, the existence of which are material to the case. Oral evidence can not be received as a substitute for any writing which the law requires to be reduced to writing; hence oral evidence is not admissible as to records, public documents, official examinations, deeds, or wills. Nor is oral evidence admissible to prove the promise, or undertaking of one man to answer for the debt, default, or miscarriage of another, or to prove a contract or agreement not to be performed within one year; nor to prove a contract in relation to lands and tenements, the law having required in these cases that the evidence of the transaction should be in writing.

As long as the writing exists, and is in the power of the party to produce it, the evidence of the transaction can not be made out by other or substitutionary evidence; and in such cases, the admission of the fact, unless solemnly made as a substitute for other proof by a party, does not dispense with the direct proof of the writing, by which it is sought to affect him; for if such proof were admissible, the obvious effect of it would be to dispense with the record and other writings. There is, however, this distinction where the record or other writing is merely a collateral or subsequent memorial of the fact, such as the registry, of births, marriages,[1] deaths, and the like; and it is not part of the fact to be proved, it has not this exclusive character; but any other legal evidence is admissible to establish the same fact.[2]

[1] This was a libel for a divorce *a vinculo* for the adultery of the respondent. After proving the marriage of the parties by the Rev. Dr. Stillman, in 1803, Parker, for the libelant, read a certificate from the Rev. Dr. Lathrop of a second marriage with one Mary Sawyer, such as is usually received as evidence of a lawful marriage, in prosecutions of this kind. But the Court thought it not sufficient evidence for the purpose for which it was offered. The fact of the second marriage must be proved on oath. *Ellis* v. *Ellis*, 11 Mass. 91.

The recording of marriage was intended to perpetuate the evidence of the fact, after the witnesses present shall have died. But a copy of such record is not so satisfactory evidence as the testimony of witnesses. These last, indeed, are necessary to prove the indentity of the parties. *Commonwealth* v. *Norcross*, 9 Mass. 493,

[2] This was an indictment against the defendants for lewdly and lasciviously associating and cohabiting together; the said Margery being alleged to be the wife of Thomas Barbarick. At the trial the solicitor-general offered to prove the marrige by the testimony of a sister of the said Thomas. She testified that

Oral evidence can not be substituted for any written contract or conveyance, for in such case the written instrument may, in a sense, be regarded as the ultimate fact to be proved; and this is especially true where the question involved relates to the proof of deeds, contracts, and negotiable securities; in fact, the principal object of committing contracts of every kind to writing is for preserving a memorial of them more lasting and more authentic than the mere memory of witnesses. Accordingly, a party is not permitted to recover in an action of ejectment, or in a suit for use and occupation, where there is a written deed or contract of tenancy without producing it. If it comes out upon the cross-examination of the plaintiff's witnesses, the defendant may move to exclude the oral testimony; but if the plaintiff makes out a *prima facie* case without showing that there was any written contract, the defendant, if he relies upon the written contract, will have to produce it;[1] otherwise the plaintiff might, upon the mere assertion of the defendant, be nonsuited for the non-production of a written instrument which, if it had been produced, might turn out not to apply to the contract in question.

Declarations of the tenant, or other parol evidence sufficient to establish an agreement to pay rent, is admissible, notwithstanding it appears that the holding is under a written agree-

about twelve years since the said Thomas and Margery left the witness's house for the declared purpose of going to the house of a clergyman about two miles distant in order to be by him joined in marriage; that after an absence sufficient for the purpose they returned, declaring that they were married; and that they lived together as man and wife, having several children, until a year since, when the husband was committed to the State prison. The jury having found the defendants guilty, a new trial was moved for on account of the admission of said evidence, and it was resolved by the whole Court that the evidence was insufficient—it was not the best which the case admitted. If these persons were married, there must be better evidence of the fact. It could be proved by the record of the clergyman, or, at any rate, by the testimony of persons actually present. *Commonwealth* v. *Littlejohn & Al.* 15 Mass, 162.

[1] The judgment must be reversed. It appearing from the examination of plaintiff's witnesses that the contract upon which they relied was in writing, they were bound to show it; or, if in the possession of the opposite party, notice to produce it should have been given before the parol evidence was admitted. It is fairly to be inferred from the return, that this objection was taken, though it is not distinctly stated in terms. *Rogers* v. *Van Holsen*, 12 John. 221; *Rex* v. *Redstow*, 4 B. & Ad.; *Thomas* v. *Griffin*, 6 Bing. 533; *Fielder* v. *Ray*, 6 Bing. 232.

ment; but where the question is not merely as to the occupation of lands, but as to the person under whom it is held, if there be a written agreement showing the fact it must be produced.[1] It is not allowable, on cross-examination in the statement of a question to a witness, to represent the contents of a letter or other writings, and to ask the witness whether he wrote a letter or other writing to any person with such contents or to like effect; because counsel might thus put the court, jury, or committee in possession of a part only of the contents of the written paper; and even if the witness acknowledged the writing or letter to be in his handwriting, he can not be questioned as to its contents, but the whole letter or other writing must be read in evidence.

Oral evidence can not be substituted for any writing, the existence of which is disputed, and which is material either to the issue between the parties or to the credit of witnesses, and is not merely the memorandum of some other fact; for by applying the rule of such cases, the court acquires a knowledge of the whole contents of the instrument, which may have a different effect from that made by the statement of a part.[2] So rigidly has this rule been enforced, that where a witness's deposition was taken in another State, or in a foreign country, and in answer to interrogatories he stated the contents of a written instrument or letter which was not produced, it was formerly held that that part of the deposition referring to the contents of the writing should be suppressed, notwithstanding the witness was beyond the jurisdiction of the court and there being no means to compel him to produce the writing. But this rule is now modified so as to admit proof of the contents of a written instrument where the original is beyond the jurisdiction of the court. Where the law requires books, records, and registers to be kept for public convenience, their contents may be proved by an examined copy.[3] This

[1] *Doe* v. *Harvey*, 8 Bing. 241.

[2] Queen's Case, 2 Broad. & Bing, 287; 1 Phil. Ev. 422.

[3] It was objected that as the grantee was within the jurisdiction of the Court he should have been summoned to produce the deed. But this objection can not be sustained. In the case of *Eaton* v. *Campbell*, 7 Pick. 10, this point was fully considered, both upon principle and practice, and the rule was established that the copy of a deed from the registry is good evidence *prima facie*, and dispenses with the production of the original, except where a grantee relies on the immediate deed to himself, or where, from the nature of the conveyance, the

exception has obtained because of the public inconvenience which the removal of such records and documents might occasion—especially if they were wanted in two places at the same time. The exception does not extend to the exclusion of the original, but wherever an examined copy of a public record is evidence, there the original, when produced, may also be used. This exception does not extend to an answer in Chancery, deposition or affidavits, where the party is indicted for perjury therein, for in such case the original must be produced in order to identify the defendant by proof of his handwriting.[1]

Another exception to the rule rejecting secondary evidence has been allowed where the evidence is the result of voluminous facts, or the inspection of many books and papers, the examination of which could not conveniently take place during the progress of the trial.[2] Thus, a witness who has examined the books and accounts of the parties, though he may not give evidence of particular facts of their contents, may testify to the general balance shown by such books and accounts without producing them. And upon the same principle, where the question is upon the solvency or insolvency of a person, a witness who has examined the books and securities of such person at a particular time, may state the result of such examination.[3] So, also, where books and documents introduced in evidence at a trial are multifarious and voluminous, and of such a character as to render it difficult for the jury to comprehend material facts without schedules or

deed is presumed to be in his own custody or power. *Scanlan* v. *Wright*, 13 Pick. 527.

In England, on the conveyance of land, all the title deeds are delivered to the purchaser, and it is reasonable there to require him to produce the original deed given to a prior grantee. In this commonwealth the mode of conveyancing is different. Here the grantee takes only the immediate deed to himself, relying on the covenants of his grantor. He has no right to the possession of the title deeds of the estate, and to require him to produce all the original deeds for twenty years or more, and to bring in the subscribing witnesses, would be unreasonable and oppressive. It will be found convenient to have a copy from the register's office *prima facie* evidence, even where the grantee lives within the commonwealth, until the case assumes a different shape on a question of fraud. *Eaton* v. *Campbell*, 7 Pick. 12.

[1] *Rex* v. *Howard*, 1 M. & Rob. 189.

[2] 1 Phil. Ev. 431, 433, 434.

[3] *Meyer* v. *Septon*, 2 Stark. 274.

abstracts thereof, it is within the discretion of the judge or other presiding officer to admit such schedules, verified by the testimony of the person by whom they were prepared, allowing the adverse party an opportunity to examine them before the case is submitted.[1]

The case of inscriptions on walls and fixed tables, mural monuments, gravestones, surveyors' marks on trees denoting boundaries, as they can not be produced in court, may be proved by secondary or oral evidence.[2]

Still another exception exists in favor of the admission of secondary evidence in the examination of a witness on the *voir dire*, where the witness upon such examination discloses the existence of a written instrument affecting his competency, the contents of such written instrument may be inquired into for the reason that the other party, or the party making the objection, may have been entirely ignorant of the existence of the written instrument until it was disclosed by the witness. On the same principle, if a witness on the *voir dire* admits facts tending to render him incompetent, the effect of which has been subsequently removed either by a release or other writing, the contents of such release or of the writing may be inquired into without producing it. Where the objection arises on the *voir*

[1] The defendant further objects that schedules made from the original papers and documents previously proved in the case, showing certain data and results obtained therefrom, and verified by the witness by whom they were prepared, were improperly admitted. But it appears to us that questions of this sort must necessarily be left very much to the discretion of the judge who presides at the trial. It would doubtless be inexpedient in most cases to permit *ex parte* statements of facts or figures to be prepared and submitted to the jury. It should only be done where books and documents are multifarious and voluminous and of a character to render it difficult for the jury to comprehend material facts without the aid of such statements, and even in such cases they should not be admitted unless verified by persons who have prepared them from the originals in proof and who testify to their accuracy, and after ample time has been given to the adverse party to examine them and test their correctness. Such was the course pursued in the present case, and there can be no doubt that in a trial embracing so many details and occupying so great a length of time as the case at bar, during which a great mass of books and documents were put in evidence, it was the only mode of attaining to an intelligible view of the cause before the jury. *Boston and Worcester Railroad Corporation* v. *Dana*, 1 Gray, 104.

[2] *Doe* v. *Coyles*, 6 C. & P. 360.

dire the rule is, that it may be removed on the *voir dire.*[1] Where, however, the witness produces the writing, it must be read.

We have previously said that a parol admission is not receivable for the purpose of proving the contents of a written instrument nor for the purpose of contradicting documentary evidence, neither will a parol admission dispense with the production of a record. There appears, however, to have been some difference of opinion at *nisi prius* upon the point whether an admission as to the contents of a written instrument may be given in evidence against the party making the admission when he is shown to be in possession of such written instrument. Lord Tenterden is said to have held, that a witness could not be asked what a party to a suit had said as to the contents of a deed executed by himself without giving the party notice to produce the deed or account for its non-production.[2] On the other hand, Mr. Justice Park is reported to have ruled upon the objection taken to the question, that what a party to a suit says is always evidence against himself, whether it relates to the contents of a written instrument or any thing else.[3]

In a case in Massachusetts it was held by the Supreme Court of that State, that where the agreement of the parties was reduced to writing, the admissions of one of the parties as to the effect of the writing was correctly rejected. If such admissions varied the terms of the written contract, they were not competent; if they did not, they were immaterial.[4]

A distinction has also been taken, and is strictly observed, between a *confessio juris* and a *confessio facti*, or a confession in court or a confession out of court. If the admission or confession is of the first named character, it is not admissible in evidence; for to receive such an admission would be to allow the party to place construction upon the written instrument in place of leaving its construction to the court, to whom it properly

[1] Lord Ellenborough, Chief-Justice: There is no question before this Court but the competency of the witness upon the *voir dire.* What he answers must be taken for better and worse. If he answers falsely he may be indicted for perjury. *The King* v. *The Inhabitants of Gisburn*, 15 East, 58; *Miller* v. *Mariners' Church*, 7 Greenl. 51; 1 Phil. Ev. 154, 155.

[2] *Bloxam* v. *Elser*, 1 C. & P. 558.

[3] *Earle* v. *Picken*, 5 C. & P. 542.

[4] *Goodall* v. *Smith*, 9 Cush. 529; *Moore* v. *Hitchcock*, 4 Wend. 293.

belongs; and often the party may not know the legal effect of the instrument, and his admission of its legal effect may be very erroneous.[1]

But where the existence and not the formal execution of the instrument is the subject of investigation, or where the instrument is collateral to the principal facts, the confession of the party is admissible as primary evidence of the facts recited in the written

[1] It may be proper, in this place, to consider the question whether a verbal admission of the contents of a writing by the party himself will supersede the necessity of giving notice to produce it; or, in other words, whether such admission, being made against the party's own interest, can be used as primary evidence of the contents of the writing against him and those claiming under him. Upon this question there appears some discrepancy in the authorities at *nisi prius*. But it is to be observed that there is a material difference between proving the execution of an attested instrument when produced, and proving the party's admission that by a written instrument, which is not produced, a certain act was done. In the former case the law is well settled, as we shall hereafter show, that when an attested instrument is in court, and its execution is to be proved against a hostile party, an admission on his part, unless made with a view to the trial of that cause, is not sufficient. The rule is founded on reasons peculiar to the class of cases to which it is applied. A distinction is also to be observed between a *confessio juris* and a *confessio facti*. If the admission is of the former nature it falls within the rule already considered and is not received, for the party may not know the legal effect of the instrument, and his admission of its nature and effect may be exceedingly erroneous. But where the existence and not the formal execution of a writing is the subject of inquiry, or where the writing is collateral to the principal facts, and it is on these facts that the claim is founded, the better opinion seems to be, that the confession of the party precisely identified is admissible as primary evidence of the facts recited in the writing, though it is less satisfactory than the writing itself. Very great weight ought not to be attached to evidence of what a party has been supposed to have said, as it frequently happens not only that the witness has misunderstood what the party said, but that by unintentionally altering a few of the expressions really used, he gives an effect to the statement completely at variance with what the party actually did say. Upon this distinction the adjudged cases seem chiefly to turn. Thus, where in an action by the assignees of a bankrupt for infringing a patent right standing in his name, the defendant proposed to prove the oral declaration of the bankrupt, that by certain deeds an interest in the patent right had been conveyed by him to a stranger, the evidence was properly rejected; for it involved an opinion of the party upon the legal effect of the deeds. On the other hand, it has been held that the fact of the tenancy of an estate, or that one person at a certain time occupied it as the tenant of a certain other person, may be proved by oral testimony. But if the terms of the contract are in controversy, and they are contained in a writing, the instrument itself must be produced. 1 Greenl. 134, 135.

instrument. Though such admission is justly regarded as of less value or weight than the writing itself, as it often happens that the witness has misunderstood what the party said, and the change of expression of a few words often gives a meaning to the statement completely at variance with the confession. Where the terms of the contract do not arise collaterally, but are the essence of the controversy, and are contained in the written instrument, the instrument itself must be produced. The acknowlment of confessions of a party as to title to real property, though they may be good to support a tenancy, or to satisfy doubts in cases of possession, yet they are not to be received against written evidence of title.[1]

[1] In *Jackson* v. *Shearman*, 6 Johns. Rep. 21, the Court say: "That the acknowledgments of a party as to title are a dangerous species of evidence, and though good to support a tenancy, or to satisfy doubts in cases of possession, they ought not to be received as evidence of title. The proof offered was that John Brown had, in conversation with several persons, both before and after M'Vey's entry, claimed the land as absolute owner. These were not declarations made by him whilst in possession, and to show the character of his possession, but declarations as to the title; and as such they were inadmissible.

Per Curiam. Assuming that the plaintiff made out in the first instance a *prima facie* evidence of good title, the validity of the defense turned upon the point of the competency of the parol proof of the lease, and its assignments. The lease belonged to the plaintiff upon the statement of the case, and was in his possession previous to the circuit, 1808. Notice was given to him previous to that circuit to produce it upon the trial. The cause was not tried until the circuit in 1809, but the effect of the notice was not spent. It applied to the trial without reference to the time. It does not appear that the cause was noticed for trial in 1808; and if it had so appeared, it would not have destroyed the effect of the notice in reference to a subsequent circuit, unless it had appeared that the notice was special, and confined to that particular circuit. The object of the notice was general, and to inform the plaintiff that the lease in his possession would be wanted upon the trial; and whenever the plaintiff noticed the cause for trial, he was bound to furnish the lease, or abide by the consequences. If after such notice given the plaintiff had parted with the lease, he ought to have apprised the defendant of it, so that he might have known where to look for it. In this case the lease was in the Court of Chancery; but as it does not appear by what means it came there, we must presume it was placed there at the instance of the plaintiff, and was liable to be withdrawn upon his application. For the purpose of the notice it was still to be considered as under his control, and in his possession. If the parol proof was admissible, then the defendant showed that O'Reilly had no title. His wife had only a life estate, and after her death the title under the lease reverted back to Henry Shearman,

CHAPTER XVII.

THE SUBSTANCE OF THE ISSUE.

In this connection it may be well to define what is meant in legal language by the term issue, as we shall often have occasion to use the term. An issue may be defined to be a single, certain, and material point, arising out of the allegations of the plaintiff and defendant; and it is either an issue of law or of fact; but it is only with the latter that we shall have occasion to speak in this chapter, and that, only so far as to show the materiality of the testimony. One of the most important rules that governs the introduction of evidence is, that it is sufficient if the sub-

under whom, as his son and heir, the defendant possessed. The next point in the case is as to the acknowledgments of Henry Shearman. These acknowledgments of the party as to title to real property are generally a dangerous species of evidence; and though good to support a tenancy or to satisfy doubts in cases of possession, they ought not to be received as evidence of title. This would be to counteract the beneficial purposes of the statute of frauds. The extent of the title transferred from Shearman to his daughter, and from her to O'Reilly, rested upon higher evidence than upon parol proof of acknowledgments by the party. It rested upon the written assignments of the lease, and the legal evidence of the extent and effect of these assignments ought to prevail. *Jackson* v. *Shearman*, 6 John. 19.

Proof of the confessions of Annine that his mortgage was not a lien on the land was properly rejected. 6 John. Rep. 20; John. Dig. 213, and the cases there referred to. As between Annine and the subsequent mortgagee, to whom the declarations alleged to have been made, the proof might have been admissible on the ground of fraud, if shown to have misled or injured him; but not between Annine and third persons. *Jackson* v. *Jackson*, 5 Cowen, 175. In *Jackson* v. *Shearman*, 6 John. 19, it appeared from parol admissions that there had been a written conveyance; and the Court excluded the parol proof, saying that the extent of the title transferred, etc., rested upon higher evidence than upon parol proof of acknowledgment by the party. It rested upon the written assignment of the lease. *Jackson* v. *Cole*, 4 Cowen, 594.

The evidence of declarations made by the defendant avail nothing; for, although parol declarations of tenancy have been received with certain qualifications, parol proof has never yet been admitted to destroy or take away a title. To allow parol evidence to have that effect would be introducing a new and most dangerous species of evidence. The statute to prevent frauds and perjuries, which has been considered the *magna charta* of real property, avoids all estates created by parol and all declarations of trusts, excepting resulting trusts, regarding any lands, tenement or hereditaments. Yet, in defiance of

stance of the issue is made out. Lord Ellenborough once held "That there are two sorts of allegations, the one of matter of substance, which must be substantially proved, the other description, that must be literally proved."[1] No allegation of matters of fact which is descriptive of the identity of that which in law is essential to the charge can ever be rejected. Thus, where the allegation was that the defendant executed his promissory note on a certain day, the substance of the allegation was the execution of the note, and proof that he executed it on any day will support the allegation, as time is not material; but if the allegation had been that the defendant executed his promissory note, and that the note bore date on a certain day, the date being descriptive of the note and essential to its identity, must be proved as laid, so, also, in justifying an action of trespass for the taking of the plaintiff's cattle damage feasant, because they were upon the close of the defendant. In such a case the averment of a freehold title is legally sufficient; but if the defendant states that he was seized of the close in fee, the averment of seizin in fee becomes an essential descriptive averment, and

this statute, we are asked to divest the defendant of what appears to be complete title to the premises by her parol declarations. This can not be listened to. *Jackson* v. *Cary*, 16 John. 305.

[1] There are two sorts of allegations: the one of matter of substance which must be substantially proved; the other of description which must be literally proved. The question is whether this be an allegation of the former sort. The allegation is, that the plaintiff was prosecuted "until afterwards, to wit, on the morrow of the Holy Trinity, in the forty-sixth year aforesaid, etc., she was in due manner acquitted." The substance of the allegation is no more than that the plaintiff was acquitted upon that prosecution; and to support this action it must also appear that she was acquitted before the action was brought. The day of acquittal is not alleged with a *prout patet per recordum*; the averment is, that the acquittal took place on the morrow of the Holy Trinity, when the record produced states that it took place on Tuesday next after Easter Term; and certainly there would be a repugnancy between the allegation and the proof, if it were to be considered as a specific allegation of the fact of the acquittal, as of a time which is shown to have been before the action brought, then the repugnancy is immaterial, and the proof in substance supports the allegation. And so it appears to me to do. If it had gone on to state that the acquittal was on a certain day as appears by the record, that might have been considered as descriptive of the record, and then the variance would have been fatal. The ground therefore on which I consider that the case of *Pope* v. *Foster* ought not to bind us as having been decided against principle is, that this is an allegation of substance and not of description. *Purcell* v. *Macnamara*, 9 East, 160.

must be proved as alleged, for the reason that the essential and non-essential averments are so connected as to be incapable of separation.

So in an action of covenant, where the breach of covenant assigned is that the defendant has not used the farm in a husbandlike manner, but has committed waste, to which the defendant replied, that he had not committed waste, but had used the farm in a good and husbandlike manner; and under this averment it was held that the plaintiff could not give evidence of any unhusbandlike treatment of the farm not amounting to waste, for the form of the averment narrows the issue to this point.[1] In actions for slander, courts used, at one time, to hold that the plaintiff was bound to prove the words spoken precisely as laid in the complaint, but it is now settled that it will be sufficient if the plaintiff prove some material parts of the words alleged. If the complaint contains several actionable words, the plaintiff will be entitled to recover, on proving some of them.[2]

Any allegation which narrows and limits that which is essential, is necessarily descriptive; thus, in contracts, libels, and written instruments, every part operates by way of description of the whole. Therefore, in this class of cases the statement of names, sums, dates, durations, etc., being essential to the identity of the writing, must be precisely proved as alleged; and this rule obtains whether the allegation is founded in contract or tort.[3]

[1] *Harris* v. *Mantle*, 3 Term R. 307.

[2] *Campagnon v. Martin*, 2 Bl. R. 790.

[3] Lord Ellenborough, Chief-Justice, now delivered judgment: This was an action against the two defendants for deceit, stated to have been committed in a joint sale, alleged in the declaration to have been made by them of some sheep, their joint property, and to have been warranted by them to be stock or sound sheep, and which proved to be unsound; and the question is, whether the nonsuit, which proceeded on the ground of there being no evidence in this case to affect William King, one of the defendants, be maintainable? The argument on the part of the defendant has been, that this is an action founded on the tort; that torts are, in their nature, several; and that, in actions of tort, one defendant may be acquitted and others found guilty. This is unquestionably true, but still, is not sufficient to decide the present question. The declaration alleges the defeat to have been effected by means of a warranty made by both the defendants in the course of a joint sale by them both of sheep, their joint property. The joint contract thus described is the foundation of the joint warranty, laid in

Where the plaintiff avers performance of a condition precedent, he can not sustain his averment by a tender, or an excuse, for nonperformance.[1] So an averment of a defendant that he had sent money to the plaintiff by mail, is not supported by evidence that he sent treasury notes;[2] but it has been held that a defendant may prove under a plea of payment in bank notes, negotiable notes on individuals, or a debt already due from the payee to the obligor, accepted as payment.[3] It is true, says the court, that payment literally means a discharge of the obligation according to its letter, but courts have extended the issue more to the spirit and confined it less to the letter.

An allegation in a real action, that the plaintiff was the owner, is supported, *prima facie*, by evidence that he was in possession; for the law presumes the possessor to be the owner of the title. So where the owner of a mill brought an action to recover damages for a diminution of profits occasioned by an obstruction erected by the defendant, it being alleged in the declaration that the plaintiff was possessed of the mill, and it appearing in evidence that the mill was occupied by a tenant at will at a reduced rent on account of the obstruction, it was held that the evidence supported the declaration, as the possession of a tenant at will was the possession at will of his landlord.[4]

the declaration and essential to its legal existence and validity; and it is a rule of law, that the proof of the contract must correspond with the description of it in all material respects; and it can not be questioned that the allegation of a joint contract of sale was not only material but essentially necessary to a joint warranty, alleged upon record to have been made by the supposed sellers. By whatever circumstances and in whatever action, be the same debt, assumpsit or tort, the allegation of a contract becomes necessary to be made; and such allegation, or any part of it, can not (as here it certainly can not) be rejected as mere surplusage—such allegation requires proof stricly corresponding therewith; it is, in its nature, entire and indivisible, and must be proved as laid in all material respects. *Weall* v. *Wm. King and Henry King*, 12 East, 453, *et seq.*; *Bristow* v. *Wright*, Douglass, 665; *Churchill* v. *Wilkins*, 1 Term R. 447; 1 Stark. Ev. 386–388.

[1] *Duckham* v. *Smith*, 5 Mon. 372.

[2] *Foquet* v. *Chadley*, 3. Conn. R. 534.

[3] *Whitington et al.* v. *Roberts*, 4 Munroe, 173.

[4] The damage to the plaintiff was immediate; it reduced the value of his property and the rent; as owner of the property he is entitled to the action. The question only is, whether his proof supports his declaration. He declares he was seized and possessed of the mill; the evidence was, that part of the time

Where, in covenant, the declaration charged that during a specified period of time the defendant deprived the plaintiff of the water necessary for his mill by diverting it therefrom and

he carried on the mill in company with his son, and for the residue of the time it was carried on by his two sons. It does not appear for what time or under what terms the sons had use of the mill; it must be presumed, therefore, that they were but tenants at will. The injury was, in fact, done while the plaintiff was in possession, and before any contract with his sons; for by the contract a deduction was made from the rents to accrue during the time they should hold. The daily diminution of profits was consequential upon a wrong done while the plaintiff was in actual possession. On this ground, and because the damage was only to the plaintiff, we think the proof supports the declaration. In the case of *Starr* v. *Jackson*, cited in the argument, the question was merely on the form of the action, whether it should be trespass or case. Here there is no question about the form of the action, but merely whether the evidence shows that the plaintiff was in possession. Technically he was, because the possession of the tenant at will is the possession of the landlord, and is enough to prove the fact alleged of possession; and as to the injury, it is clear that it was done to the plaintiff, and that all the damage was suffered by him. Under these circumstances, it would be too strict to put the parties to the expense of another trial if there were a technical error in the declaration, which, however, we do not think satisfactorily made out. It is said that in the case of *Baker* v. *Sanderson*, reported in 3 Pick. 348, a different doctrine was advanced by the Court; but we do not see that case in this light. The second count in the declaration was objected to because it alleged that other persons than the then plaintiff were in the actual possession of the mill during part of the time for which damages occasioned by the defendant had been given by the jury; but that objection was overruled, because, in the same count, it was averred that the plaintiff had reduced his rent on that account. Now, it is inferred from this in argument, that because in the present case the plaintiff has alleged that he was possessed, this allegation is contradicted by the evidence that the sons, during part of the time, had the use of the mill; but such an inference is not necessary. The objection was that the count was bad because it alleged that during part of the time when the injury happened the mills were in possession of another. This would have been insuperable, as is stated in the opinion, but for the subsequent averment of the reduction of the rent, for the plaintiff would have himself shown that the lessee, and not he, had suffered the damage.

In the present case the objection is not to the count, but to the evidence. The plaintiff avers that he himself was seized and possessed; it turns out that for one part of the time one of his sons occupied with him, and that for another part his two sons occupied without him—not under lease, but, as we suppose, by some verbal contract. This evidence did not negative his possession, for in law he was still in possession; and then as to his right to recover under these circumstances, it appearing that on account of the obstruction he had reduced the rent, the case is brought within the principle on which the case of *Baker* v. *Sanderson* was decided. *Sumner* v. *Tileston*, 7 Pick. 201.

suffering it to be diverted by others; held, that the plaintiff was not limited in his proof by acts committed by the defendant or other persons to the period stated in the declaration, but might prove previous acts in consequence of which the injury was sustained during the alleged time.[1]

Where the gist of the action is negligence, the party will be confined to the species of negligence averred in the complaint. Thus, where the plaintiff alleges misfeasance as the gravamen of the action, he will not be permitted to go for nonfeasance.[2] So in an action by a passenger in a coach against the owner for an injury done him in overturning the coach, where the complaint alleged that the servant of the defendant negligently drove, conducted, and managed the coach, the plaintiff can not recover if the negligence consisted in sending out an insufficient coach.[3] But where the charge was that the defendant so carelessly and negligently provided, fitted out, and managed their stage coach that while they were driving it broke down and injured the plaintiff, and the injury turned out to have been occasioned by the insufficiency of the coach itself, it was held that there was no variance.[4]

[1] *Hollensworth* v. *Dunbar*, 9 Munf. 199.

[2] Jackson, Judge, says: "It was suggested at the argument, that there was evidence produced at the trial to prove the specific injury as alleged, and that it was probably not reported, as having no influence on the questions raised on the trial. But supposing that this could now be made to appear, still, as the jury were instructed to assess damages 'which the plaintiff had sustained by the defendant's neglect to make repairs,' it is necessary to consider whether defendant is liable for such damages under the circumstances of this case; for, if he is not so liable, the verdict must be set aside, as we can not know how much the jury may have assessed on that account. The first objection is, that the declaration does not set forth any such neglect as the ground of damage, but relies altogether on a misfeasance by the defendant. There is an important difference between these two kinds of injuries. If one has a private way over my land, I am liable to an action for stopping the way, but not for suffering it to be out of repair. And in cases where a defendant would be liable for a nonfeasance as well as for a misfeasance, the declaration ought to show distinctly with which of them he is charged, that he may prepare his defense accordingly. It seems, therefore, very clear that as this declaration now stands, evidence of the defendant's neglect to make repairs was inadmissible, and that no damages ought to have been assessed for such neglect." *Doane* v. *Badger*, 12 Mass. 68.

[3] *Mayor* v. *Humphreys*, 1 Carr. & Payne, 25.

[4] Putnam, Judge, in delivering the opinion of the Court, said: "The plaintiff alleges that he has received a grievous injury by reason of the defendants omitting

Under a count against a sheriff for a voluntary escape, the plaintiff is entitled to recover if he proves a negligent one,[1] but in trespass, if the defendant pleads a license to enter, and issue is taken thereon, evidence of a lease will not support the plea.[2]

to provide a suitable coach in which they, for a reward, undertook to carry him safely. He says that the defendants disregarded their duty in that behalf, and so 'carelessly and negligently provided, fitted out, managed, and conducted their coach that it broke down and broke the plaintiff's leg.' And it is contended for the defendants, that the plaintiff can not be permitted to prove any unskillfulness in the mode of driving or conducting it; that the terms 'provided' and 'fitted out,' as applicable to the coach, mean the furnishing it with convenient internal accommodation, independent of the carriage itself, and do not extend to the sufficiency or safety of the coach for the transportation of passengers. We can not think that the terms employed should have so limited a construction. We think that the plaintiff sets forth his claim to damages as well from the insufficiency of the coach as from the carelessness of the driver in conducting it. The declaration states that the defendants received the plaintiff into their stage coach for the usual hire and reward, therefor to be faithfully and carefully conveyed and transported from, etc. Having done that, the law imposed upon the defendants the duty of furnishing a suitable coach and of having it properly conducted for the purpose. In Webster's Dictionary, to provide is defined, 'to make ready for future use,' 'to furnish,' 'to supply.' This word is used in an enlarged sense in Park on Ins. (7th edit.) 352. The assured is 'indispensably bound to *provide* a good ship, able to perform the voyage,' and *to fit* is defined by Webster 'to make suitable,' 'furnishing a thing suitable for the use of another,' 'to prepare,' 'to furnish with things proper or necessary.' The duty of the defendants, then, was to supply a coach suitable for the safe conveyance of passengers, furnished with all things necessary and proper. The plaintiff alleges that they neglected to do so; and he proves that the nut to secure one of the wheels to the axle was unfit for its purpose. The wheel came off, and the coach broke down in consequence of that neglect. We are all of opinion that there was no variance between the evidence and the allegation." *Ware* v. *Gay*, 11 Pick. 108.

[1] *Bonafous* v. *Walker*, 2 Term R. 126.

[2] Jackson, Judge, said: "As to the first count, it is very clear that a license by the guardian would determine at his death. This is not denied; but it is said that the facts stated in the plea show that this was a lease, not a license, and that if it was a lease, the defendant was not a trespasser by holding over after the end of the term, but would be a tenant at sufferance until a re-entry by the plaintiff or a notice to quit; and that the defendant ought not to be prejudiced by having miscalled it a license.

If such a mistake had occurred in a deed or any act *in paio*, the Court would not, perhaps, be precluded from construing the expression according to its legal effect and the true intent of the parties. But more strictness is required in pleadings. The party is to state his case according to the legal effect and operation of the facts on which he relies. It is not sufficient to display the evidence on the record and leave it to the Court to infer that there was a feoffment,

The same principle applies in criminal as in civil proceedings, and in criminal prosecutions the substance of the charge ordinarily is all that is necessary to be proved. Thus, the accused may be found guilty of a part of the charge, and acquitted as to the residue, or he may be convicted upon one charge or specification and acquitted upon another, or upon one part of a charge capable of division, and not guilty of the other part; as, on a charge for composing and publishing a libel, the defendant may be found guilty of publishing only. In general, where from the evidence it appears that the defendant has not been guilty to the extent of the charge specified, he may be found guilty so far as the evidence warrants. But if a contract or other written instrument be described, or set out in an indictment or other criminal charge, it must be proved as laid. Where the accusation includes an offense of an inferior degree, the jury or committee may discharge the defendant of a higher crime, and convict him of a less atrocious one. Thus, upon an indictment for burglarious stealing, the prisoner may be convicted of the theft, and acquitted of the burglarious entry.[1]

So upon an indictment for murder the defendant may be convicted of manslaughter (2 Hale, 302). On an indictment for stealing privately from the person, the defendant may be found guilty of larceny, or on an indictment for grand larceny, the offense may be reduced to petit larceny, and robbery may be softened into felonious theft; and, on an indictment founded on a statute, the defendant may be found guilty of a common law offense. The only exception to this rule would seem to be where the prisoner, being originally indicted for a different offense, could be deprived of any advantage which he would otherwise be entitled to claim; in which case the prosecutor is not permitted to oppress the defendant by altering the mode of pro-

a lease, or a license; but he must say that the party did enfeoff, or did demise, etc. If the defendant in this case had pleaded a lease by the guardian, the plaintiff might have traversed it, and from what appears in the case, there seems to be no doubt she would have done so, because, on the general issue to this same count she obtained a verdict. It being pleaded as a license, she had no occasion to deny it, although it might be wholly untrue, because she had a better answer, namely, that all the trespasses complained of were committed after the expiration of the supposed license. *Johnson* v. *Carter*, 16 Mass. 444.

[1] 1 Leach, 36; 2 East, P. & C. 516; 1 Hale, 559, 560.

ceeding. A defendant, therefore, can not be found guilty of a misdemeanor on an indictment for a felony.[1] A variance in criminal cases, as to an allegation of numbers, magnitude, or value, is in general unimportant, provided that it does not fall within the exception before stated in civil cases, and that what is proved in respect to these particulars is sufficient to constitute the offense charged.[2]

Where a person or thing, mentioned in a charge or specification, is described with unnecessary particularity, it must be proved; thus, an indictment for stealing a black horse, the color need not have been mentioned, yet having mentioned the color in the indictment or specification, a variance between the allegation and proof in this respect is fatal (1 Stark. Ev. 374). So in an indictment for stealing a promissory note or bill of exchange, though it would be sufficient to describe it generally as a promissory note or bill of exchange, yet if the name of the maker be stated or averred in the indictment, it must be proved. So, also, where property is stolen, the name of the owner must be alleged and proved as laid.[3] It is sufficient, if a thing is described in an indictment, bill of charges, or specifications, by its generic name, if it has one, and such a charge may be supported by proof of a species, which comes within such generic description. Thus, if the charge be of a felonious assault with a club, and the proof be of such an assault with a stone; or, if the charge be of a wound with a sword, and the proof be of a wound with an ax, yet the charge is substantially proved.

In an indictment for perjury in open court, the term of the court must be correctly stated, and strictly proved; so, also, where the term is designated by the day of the month, the precise day is material. So a written contract, when set out in an indictment, must be strictly proved; but it was held that an averment setting out a promissory note, according to its purport and effect, and not according to its tenor and effect, is supported by proof of a note of the same legal effect.[4] A complaint or dec-

[1] 12 Mod. 520.

[2] *Rex* v. *Jenks*, 2 East, P. & C. 514; 2 Camp. 264; 1 Hale, 513.

[3] Clark's Case, Russ. & Ry. 358.

[4] The Court say: "As the indictment set out the note according to its purport and effect, and not according to its tenor, we think the variance is not ma-

laration which sets forth an executory agreement of the defendant, and alleges an excuse from the performance thereof, by the waiver of the defendant, is not supported by proof, that the defendant failed to comply with his part of the agreement within the time fixed by the agreement.[1]

There can be no doubt of the admissibility of a written contract in evidence in support of the contract declared on, where the only objection is, that the declaration does not aver that the contract was in writing. Such an averment is not required even in declarations or contracts, that are within the statutes of fraud, that is, such contracts as the law requires to be in writing before they are legally enforceable.[2] While this is true in actions upon

terial. *I promised* would be construed to mean *I promise*. But it was not sufficiently proved that the offense was committed in the county of Worcester. The evidence was only that the note was here uttered. It is clear from authority that the offense of forging in the county can not be inferred from the fact of uttering and publishing in the county." *Commonwealth* v. *Parmenter*, 5 Pick. 279.

[1] Metcalf, J., said: "The plaintiff's declaration sets forth an executory agreement of the defendant to do certain work, for a certain sum, and within a certain time, on materials to be furnished by the plaintiff, and alleges that the plaintiff did furnish the materials to the defendant in season for him to complete the stipulated work within the stipulated time. And the question is, whether this declaration was legally proved by evidence, that the plaintiff furnished the materials to the defendant, but not in season for him to complete the work thereon, according to the agreement, and that the defendant nevertheless received and worked on them. We are of opinion that it was not, but that there was a fatal variance between the allegation and the proof.

"It is a cardinal rule of evidence that allegations essential to the plaintiff's claim must be proved. In the declaration in this case it was essential, in order to show the plaintiff's claim, that he should allege that he furnished or was ready to furnish the defendant with the materials on which he was to work, and in season for him to complete the work on them within the stipulated time; or else, that he should allege a sufficient excuse for not so furnishing them. 1 Chit. Pl. 6th Am. Ed. 351, 358; 6 Greenlf. 111, 112; 2 Met. 502, 503. The plaintiff has adopted the former course, and has alleged his performance of what the agreement required of him, and to prove this allegation, he relies on evidence of matter which excused him from such performance, to wit: a waiver thereof by the defendant. But a waiver by one party to an agreement of the performance of a stipulation in his favor, is not a performance of that stipulation by the other party. It is an excuse for non-performance, and as above stated should be so pleaded. *Colt* v. *Miller*, 10 Cush, 50, 51; *Metzner* v. *Bolton*, 24 Engl. Law & Eq. 537.

[2] And there can be no doubt as to the admissibility of a written contract in evidence to prove the contract declared on, though the declaration does not aver

contracts not under seal, the uniform rule is, that if any part of the contract proved should vary essentially from the contract stated in the complaint, or other pleading, the objection will be fatal; for a contract is an entire thing, an indivisible. But where a contract consists of collateral provisions, and of distinct parts, and the gravamen is that certain acts are specified in the contract, which the defendant engaged to do, but has not done, it will be sufficient to state the time, manner, and other circumstances of its performance, and the failure of the other party to perform the act complained of, without making any mention of the other acts enumerated in the contract.[1] The entire consideration must be stated correctly, and the entire act to be done in virtue of such consideration, and with such statement the proof must agree. Where a contract is in the alternative, at the option of the defendant, the allegation must not be of an absolute contract, or, if the averment be to perform on a certain day, or on the happening of a certain event, and the proof be to perform in

that it was in writing. It is generally unnecessary in declaring on a simple contract which is in writing to allege it to be so. This allegation is not required even in declarations on the contracts that are within the statute of frauds. *Davenport* v. *New England Mutual Fire Insurance Company*, 6 Cush. 340.

[1] Bayley, B., said: "I take it it to be perfectly clear that an agreement may be void as to one part, and not of necessity void as to the other." "It by no means follows that because you can not sustain a contract in the whole, you can not sustain it in part, provided your declaration be so framed as to meet the proof of that part of the contract which is good."

The three leading cases cited by the defendants counsel in the present case, to show that a contract void in part by the statute of frauds is void in the whole are, *Lord Lexington* v. *Clarke*, 2 Vent, 223; *Chater* v. *Beckett*, 7 T. R. 201; and *Thomas* v. *Williams*, 10 Barn. & Cress. 664. All these cases were considered by the Court in *Wood* v. *Benson*, before cited, and were shown to have been rightly decided, upon another ground, to wit, that of a variance between the declaration and the evidence. In each of those cases, the declaration stated the entire agreement, including that part of it which was void.

Bayley, B., said: "These cases are to be supported on the principle of the failure of proof of the contract stated in the declaration; but they do not establish that if you can separate the good from the bad you may not enforce such part of the contract as is good."

The special count in the present case sets forth the whole agreement of the parties. Part of that agreement being within the statute of frauds is void, and, therefore, the contract as alleged was not proved, and could not be proved. The plaintiff, therefore, can not recover on that count. *Ervine* v. *Stone et another*, 6 Cush. 511, 512.

a reasonable time, there is a variance. An averment which is merely matter of inducement to the action need not be proved with the same degree of strictness and precision that is required in matters of substance; thus, where an action was brought to recover double the value of goods, which had been removed for the purpose of preventing a distress, and the complaint or declaration stated a certain sum to be in arrears for rent, it was decided that the plaintiff was entitled to recover, although the notice of the distress was for a less sum.[1] In the case under consideration, the damage was not to be measured by the quantity of rent, but by the value of the goods that had been removed; and it was, therefore, perfectly immaterial whether the particular sum stated in the complaint was in arrears or not.

There is a material distinction between redundancy in the allegation and redundancy in the proof. In the case of redundancy in the averment, a variance between the allegation and the proof, under most circumstances, will be fatal if the redundant allegation is descriptive of that which is essential; but redundancy in the proof can never vitiate, because more is proved than is alleged, unless the matter superfluously proved goes to contradict some essential part of the allegation.[2]

It may not, perhaps, be easy to define the meaning of the term redundant in a short sentence such as we have room for in this connection, but the true meaning of the term we take to be this: the defendant is not to insert in his plea any matter foreign to the allegation he is called upon to answer, though such matter may be admissible in a plea or answer; but he may, in his plea or answer, set up matter by way of explanation, pertinent to the issue, even if such matter be wholly incapable of proof; but if such matter is introduced into the plea or answer, and not afterwards proved, the court will give no credence to it. It often becomes an important inquiry how far redundancy of allegation is material to be proved. The safe rule is, that if the averment may be struck out without destroying the plaintiff's right of action, it will not be necessary to prove it; but it is otherwise if the averment can be struck out without getting rid of a part

[1] *Gromnet* v. *Phillips*, 3 Term R. 643; *Stoddard* v. *Palmer*, 3 Barn & Cress. 2.
[2] 1 Stark. Ev. 401.

essential to the cause of action, for then, though the averment be more particular than it need have been, the whole must be proved.[1] Thus, in an action of tort for the breach of a warranty for selling goods unfit for sale, the declaration averred that the defendant had knowledge of the fact, and of which there was no evidence at the trial, the court held that the proof of knowledge was not necessary—that the liability of the defendant was the same whether he had knowledge of the fact that the goods were unfit for sale or not.[2] Where the complaint is founded upon a deed or other specialty, every part stated in the complaint as descriptive of the deed or other specialty should be exactly proved, whether the part set out in the complaint was necessary to be stated or not. In declaring upon a deed, it is not necessary to use the deed, but it will be sufficient to state the substance and legal effect of it.[3] In determining whether a deed is stated according to its legal effect, it will not be necessary to show a strict identity; hence it is that an artificial and legal identity as contra-distinguished from a natural identity must be resorted to as the

[1] Lord Ellenborough, Chief-Justice, said: "The distinction between immaterial and irrelevant averments was well taken in *Bristow* v. *Wright*. That was an action on the case against a sheriff for taking the tenant's goods in execution without satisfying the landlord for a year's rent, and the plaintiff averred that the rent was reserved quarterly, whereas it turned out to be reserved yearly. There, if the whole averment as to the reservation of the rent had been struck out, the plaintiff could not have maintained his action, because some rent must necessarily have been averred to be due, and though it was unnecessary to have stated it to be reserved quarterly, yet the defendant was entitled to avail himself of the defect of proof in that particular. But here, if the whole averment respecting the defendant's knowledge of the unfitness of the wine for exportation were struck out, the declaration would still be sufficient to entitle the plaintiff to recover upon the breach of the warranty proved. For if one man lull another into security as to the goodness of a commodity by giving him a warranty of it, it is the same thing whether or not the seller knew it at the time to be unfit for sale; the warranty is the thing which deceives the buyer who relies on it, and is thereby put off his guard. Then, if the warranty be the material averment, it is sufficient to prove that broken to establish the deceit." *Williamson* v. *Allison*, 2 East. 450, 451.

[2] *Pepin* v. *Soloman*, 5 Term, 496.

[3] In setting forth the material parts of a deed or other written instruments, it is not necessary to do it in letters and words. It will be sufficient to state the substance and legal effect. Whatever is alleged should be truly alleged. A contract substantially different in description or effect would not support the averment of the declaration. *Ferguson* v. *Harwood*, 2 Curt. 598.

proper test of variance; that is, it is sufficient if the proof correspond with the allegations in respect to those facts and circumstances which are in point of law essential to the charge or claim.[1]

Where a record is declared on the term of the court at which the judgment was rendered, and the names of the parties, also the amount of the judgments, are held to be descriptive, and must be proved strictly as alleged, thus a variance of one-half of a cent between the amount named in record and the amount alleged in the complaint has been held to be fatal and to constitute a variance; but it is sufficient, as to the other facts, to make substantial proofs, unless they have been so declared on as to become descriptive of the record. Thus, in an action for malicious prosecution, the day of the plaintiff's acquittal is not material, unless it is alleged in the complaint that the day of the acquittal appears so of record, and then it becomes descriptive.

But since the passage by the British Parliament of an act known as Lord Tenterden's Act, in regard to variance between matters in writing and in print produced in evidence and the recitals thereof upon the record, the effect which was formerly given to a variance between the allegations and the proofs may be avoided by amendment. The same liberal doctrine of amendment has now been adopted in almost every State of the Union, but this rule in regard to amendments has not yet been applied, either in England or America, to criminal proceedings, but has been exclusively confined to civil procedure. But we can see no reason why it might not, with equal propriety, be allowed in criminal as well as civil practice.

Whether the doctrine of amendments as recognized in our civil tribunals should be applied to Church trials and other ecclesiastical investigations remains yet an open question. If such investigations are in the nature of a civil proceeding, then, by analogy to proceedings in our courts of justice, we can perceive no reason why amendments should not be allowed, and thereby avoid the reproach so justly visited upon the courts before the statutes of jeofails were enacted.

[1] 1 Stark. Ev. 431; *Van Renseleer* v. *Gallop*, 5 Denio, 458; 1 Phillips Ev. 205; 1 Greenl. Ev. 863.

CHAPTER XVIII.

RELEVANCY OF EVIDENCE.

THE question of the admissibility of the evidence offered in any case is one for the decision of the court or other presiding officer. It is the province of the court or presiding officer, as we have previously shown, to determine all questions arising on the admissibility of evidence, even if the decision involves the finding upon questions of fact; for the rule is, that such preliminary questions of fact are to be tried by the presiding officer in the first instance, though in his discretion he may take the opinion of the jury or committee upon them, but where the question consists of both law and facts so blended as not to be susceptible of separate decisions, the judge or presiding officer may submit the same to the jury under instructions of law arising upon the case; or in a Church investigation the whole question, including both law and facts, may be left to the committee. If the genuineness of a deed or other written instrument is a fact in question, the preliminary inquiry of its execution should be made before the court, and the court should determine whether the evidence is sufficient to justify the court in sending it to the jury. The evidence offered in the first instances is not to the jury but to the court, and the decision of the court does not determine the genuineness of the instrument, but the court only decides the question as to whether there is, *prima facie*, any reason at all for sending it to the jury; and the genuineness of the deed or other written instrument where that fact is in issue, must regularly be proved to the jury, the same as though no determination thereof had been made by the court. This rule obtains as well in those States where by statute the jury are made both the judges of the law and the fact as in those States where the court is the judge of the law and the jury of the facts.[1]

[1] By the last clause of section 6 of article 8 of the Constitution of this State, it is declared that "in all indictments for libels the jury shall have the right to determine the law and the facts under the direction of the court, as in other cases." It would seem, from this, that the framers of our bills of rights did not imagine that juries were rightfully judges of law and fact in criminal cases,

In determining upon the admissibility of evidence the rule is, that if the facts offered in evidence constitute a link in the chain, although it does not bear directly upon the issue, yet it is admissible, although, standing alone, it might not be sufficient to justify a final judgment upon it; nor is it necessary that the relevancy of the evidence should appear at the time when it is offered, provided that counsel will undertake subsequently to connect it with the issue. But this matter is one that is purely in the discretion of the court. Where evidence is offered under the assumption of counsel that he will connect it so as to render it relevant, and he fails so to do, the court, upon application, will direct the jury to disregard such evidence altogether.

Sometimes it becomes necessary to depart from the strict rule of the law in this respect and to allow evidence to be introduced of apparently collateral facts. Thus, where a witness of the plaintiff denied the existence of a material fact, and testified that persons connected with the plaintiff had offered him money to assert its existence, the plaintiff was allowed to prove the fact by other witnesses and to disprove the subornation on the ground that this latter fact had become material, inasmuch as its truth or falsity might fairly influence or prejudice the plaintiff's case.[1]

In trials for conspiracies and other offenses involving a great multitude of circumstances, very great latitude is sometimes necessarily taken, though it should be avoided if practicable. Thus, on a trial of indictment against five persons for a conspiracy to obtain merchandise, letters were offered from one or two respecting the obtaining of merchandise. Generally they

independently of the directions of courts. Their right to judge of the law is a right to be exercised only under the direction of the court, and if they go aside from that direction and determine the law incorrectly, they depart from their duty and commit a public wrong, and this in criminal as well as in civil cases. *Montgomery* v. *State of Ohio*, 11 Ohio, 427.

The jury are the judges of the facts both in civil and criminal cases, bu they are not, in either, the judges of the law. They are bound to find the law as it is propounded to them by the court. They may, indeed, find a general verdict including both the law and the facts, but, if in such verdict they find the law contrary to the instructions of the court, they thereby violate their oath. *Townsend* v. *The State*, 2 Blackf. 151; *The Treasurer of Perry County* v. *William F. Moeler and Thomas Hood*, 11 Ohio, 428; *Panton* v. *Williams*, 2 Ad. & El. 169.

[1] *Melhiersh* v. *Collier*, 15 Ad. & El. 878.

contained no direct proof of a conspiracy, nor was any general conspiracy established; yet these letters were received on the ground that they might become material in the course of the cause. If their materiality should not appear, the court should direct the jury to disregard them. So an order inclosed in a letter was received on the same principle. It is scarcely necessary to observe, that though a circumstance be proper as tending to show a particular fact, it is inadmissible unless the fact itself be relevant to the question at issue. Thus, where the sheriff levied upon money for "F," on execution, and then levied on the same money in his own hands on a *fieri facias* against F, and being sued by F, the sheriff offered oral evidence to show that F was insolvent and had taken the insolvent debtor's oath; but it was held that this evidence, offered with a view of proving the insolvency of F, was irrelevent; that while it might be true that the evidence offered might entitle other persons than the plaintiff to the money, it could not prevent a recovery in the plaintiff's name. It was therefore held inadmissible, not because the facts offered might not be material to establish a right in third persons, but because that right existing and being shown, it could not, upon any thing appearing, affect the plaintiff's right to recover.[1]

[1] It is not error to reject legal evidence of an irrelevant fact. The defendant offered to show that the trustees of Philip R. Fendall were not entitled to certain money levied by virtue of the execution mentioned in the notice, which testimony was rejected by the Court; and to this opinion a bill of exceptions was taken, and on such bill of exceptions the case was brought to the Supreme Court of the United States, where the Chief-Justice delivered the following opinion, namely: "In considering the second error assigned, the Court was satisfied that the proceedings before magistrates in cases of insolvent debtors are entirely matters *in pais*, and are therefore to be proved by parol and other testimony. The evidence offered was certainly legal evidence to establish the fact for which it was adduced. The Court, however, is not satisfied of its sufficiency; but without determining that question, and without determining whether, in a case where there is no jury, a judgment ought, for the rejection of testimony which was admissible in law, to be reversed in any state of things, or the cause should be considered as if the testimony had been received, it is the opinion of all the judges that the party is bound to show the relevancy of the fact intended to be established to the case before the Court.

"In the present cause the fact to be established was the insolvency of Fendall, which insolvency is not shown to have been material in the case, since nothing appears in the record to induce an opinion that the proceeding could have been in any other name than his.

The plaintiff may sometimes by his own acts exclude an inquiry, which would otherwise be relevant, but he can not go to the jury on two inconsistent propositions. Thus, where the defendant gave evidence to impeach a note for want of consideration, and the plaintiff, in order to prove a pecuniary consideration, introduced certain evidence which the defendant answered by proof of the plaintiff's declarations that the consideration was a special agreement, it was held that the plaintiff was precluded from insisting on both, but must be confined to a vindication of one of his propositions. He has, however, the right to elect the one he wishes to vindicate.[1] And where the plaintiff proved the distinct confessions of the defendant made at different times, one of which did and the other did not support the declaration, it was

"Although, then, the testimony rejected was proper and legal evidence towards showing and establishing the fact, yet the Court committed no error in rejecting that testimony for which their judgment ought to be reversed, because the fact does not appear to have been relevant to the cause under consideration." *Turner* v. *Fendall*, 1st Cranch, 132.

[1] But the judge also charged the jury that this consideration was supported by the evidence to be drawn from the confessions of the plaintiff as proved on the part of the defendant, thus making the plaintiff's own confessions and declarations evidence to support a consideration totally different from that which he had endeavored during the whole course of the trial to prove was the true consideration, and which he had produced witnesses to support by their oaths. If the consideration for this note was not entirely pecuniary, then Benjamin Shattuck, the principal witness for the plaintiff, was guilty of the most gross and deliberate perjury, and must have been suborned by the plaintiff himself. Can a party be permitted to go to a jury upon two distinct and entirely contradictory and irreconcilable grounds? Suppose that the plaintiff had first proved that the note had been given on a pecuniary consideration, but apprehensive by the evidence given by the opposite party, that his witnesses would not be credited, had then called another lot of witnesses, who testified that it was given upon the contract or agreement which has been supposed in the first place, would he have been permitted to do so? And if he had been, should the jury have been instructed that either of the considerations proved would support the note? ought they not rather to have been charged that the witnesses effectually destroyed each other, and that neither was entitled to credit? That the plaintiff by taking two contradictory grounds had deprived himself of the benefit of both? Can the declarations of the plaintiff himself, when proved by the defendant, be more available to the plaintiff, than the same facts would be if the plaintiff himself had established them by competent evidence? If the plaintiff had acquiesced in the evidence given by the defendant as to the consideration of the note, and had reposed himself upon it as a legal consideration, there would have been no objection to it. But instead of that, he denies that that was the consideration, and

held that the declarations being inconsistent, the plaintiff could not rely on them both; but that he might adopt the one that supported the declaration and reject the other.[1] It follows from what we have already said that evidence may be relevant and support one count of a declaration, or one specification in a bill of charges, and be irrelevant and fail to support another, yet, where the evidence is admissible under any circumstances, and in support of either count in a declaration, or either specification in a bill of charges, it is receivable. It should also be remarked in this connection that the question is not whether the evidence offered be the most convincing, but whether it tends at all to illustrate and support the issue. To make testimony relevant, it is not necessary that it should be essential, and that a recovery or a conviction could not be had or obtained without it. It is sufficient if it be cumulative and supererogatory. Thus, in proving a sheriff's sale of land, on execution, the conditions of the sale need not be shown; yet, if they are shown, though objected to, this is not an error, for the conditions are a part of the *res gestæ*. Testimony may be admissible for one purpose, though not for

produces a multitude of witnesses to establish another and entirely different one. He maintains, and he labors by his evidence to prove, that the declarations which he is shown to have made as to the considerations were false; and yet the jury are instructed that, if they believe those declarations, the plaintiff is entitled to recover.

Under these circumstances, the case appears to me to bear a strong analogy in principle to that class of cases in which it has been held that where the consideration is set forth in a written contract, evidence to show that a greater or different consideration was intended, is inadmissible. 1 John. 139; 3 John. 506; 7 John. 341; 2 W. Bl. 1249. That rule, it is true, is founded on the established doctrine that a written contract can not be contradicted or varied by parol. But so far as that doctrine has any foundation in moral principle, independent of considerations of public policy, it is this: that a party shall be concluded by his own solemn declarations, and shall not be permitted to prove that what he has once declared in writing was the sole consideration was not so. With how much more force does the principle apply to a case where that declaration is made by the oaths of moral and responsible beings, in the presence of God and man, swearing by the procurement, and at the instigation of the party himself, and where the contradictory evidence consists of his own declarations and confessions? To permit those declarations under such circumstances to be used in this way, appears to me to be subversive of all morals.

In this respect, therefore, we think the judge erred; and that a new trial must be granted. *Winchell* v. *Latham*, 6 Cowen, 688, 689, 690.

[1] *Hale* v. *Andrus*, 6 Cowen, 225.

another; and on the same principle testimony may be relevant when offered for one purpose, and irrelevant when offered for another. Thus, acts of misfeasance, or malfeasance, may be given in evidence if they are immediately connected with the plaintiff's cause of action, not as a set off, but to defeat partially or wholly the plaintiff's claim by impeaching it.[1]

So in an action for the price of millstones, that the plaintiff warranted to be good, it was held that it was competent for the defendant to show a breach of the warranty.[2]

CHAPTER XIX.

COLLATERAL FACTS.

EVIDENCE of collateral facts, which are incapable of affording a reasonable presumption as to the principal fact, tends to draw the mind away from the point in issue, and to mislead and extend the investigation; and, therefore, the same should be excluded. This rule has been adhered to even in the cross-examination of witnesses. A party will not be permitted to ask the witness a question in regard to matters not relevant to the issue, for the purpose of laying the foundation for his contradiction. The rule upon this point is well settled; namely, a witness can not be examined in chief or cross-examined upon an immaterial fact with a view to contradict him. If an immaterial fact is stated by a witness of his own accord or as introductory merely to material testimony, or if the party who calls a witness is permitted without objection to question him as to immaterial facts, the irrelevant testimony must be regarded in the same manner as though it had come out on cross-examination; and the other party can not call witnesses to contradict it.[3]

[1] *Gogle* v. *Jacoby*, 5 Serg. & Rawle, 117–122.

[2] *Steigleman* v. *Jeffries*, 1 Serg. & Rawle, 477.

[3] The question is, whether the statement of an immaterial fact can be contradicted if it comes out on the examination of a witness in chief. Now neither party can be allowed to show the internal condition of this institution, by way of excuse, justification, or apology for the attack made upon it; so on an indictment for setting fire to a house of ill fame, the bad character of the house is no

Where the knowledge or intent of a party becomes a material inquiry in the case, evidence has been received of facts which happened before and after the principal transaction and which had no direct connection with it. Thus, in an indictment for knowingly altering or forging a promissory note, bank bill, or bill of exchange, proof that the defendant had altered, counterfeited, or forged a promissory note prior to, or even subsequent to, those set forth in the indictment, are admitted as tending to prove the guilty knowledge or intent. In actions of slander or libel, evidence of other slanderous words spoken, or other defamatory articles written by the defendant at different times, is admissible in evidence as tending to show the spirit and intention of the party in speaking the words or publishing the libel

ground of defense. Then the only object of the prisoner must be to affect the credibility of the witnesses by contradicting them. But it seems to us that if an immaterial fact is stated by a witness of his own accord, or as introductory merely to material testimony, or if the party who calls a witness is permitted without objection to question him as to material facts, the irrelevant testimony must be regarded in the same manner as if it had come out on cross-examination, and the other party can not call witnesses to contradict it. Now here the evidence as to the insanity of the nun was immaterial; it was not objected to by the prisoner's counsel, the Court were not called to pass upon its admissibility, and we think that evidence to contradict it is immaterial, and therefore can not be received. *Commonwealth* v. *Buzzell*, 16 Pick. 158.

The Court were all decidedly of opinion that it was not competent to counsel on cross-examination to question the witness concerning a fact wholly irrelevant to the matter in issue if answered affirmatively, for the purpose of discrediting him if he answered in the negative, by calling other witnesses to disprove what he said. That in this case, whatever contracts the witness might have entered into with other persons for other loans, they could not be evidence of the contract made with the defendant, unless the witness had first said that he had made the same contract with the defendant as he had made with those persons, which he had not said. They observed that the rule had been laid down again and again, that upon cross-examination to try the credit of a witness, only general questions could be put, and he could not be asked as to any collateral or independent fact merely with a view to contradict him afterwards by calling another witness. The danger of such a practice would be obvious, besides the inconvenience of trying as many collateral issues as one of the party chose to introduce and which the other could not be prepared to meet. Lord Ellenborough added that he had ruled this point again and again at the Sittings, till he was quite tired of the agitation of the question, and therefore he wished that a bill of exceptions should be tendered by any party who was dissatisfied with his judgment, that the question might be finally put to rest. *Spenceley Quitam* v. *De Willatt*, 7 East, 110

Harris v. *Tippet*, 2 Campb. 637; *Odairne* v. *Winkley*, 2 Gallison, 53.

charged. And it is wholly immaterial in this view whether the other words spoken or libel published be in themselves actionable or not.[1]

Whenever the intent of the party forms part of the matter in issue, evidence may be given of other acts not in issue, provided

[1] It has been already observed, that where words have been uttered, or a libel has been published of the plaintiff, by which actual or presumptive damage has been occasioned, the malice of the defendant is a mere inference of law from the very act, for the defendant must be presumed to have intended that which is the natural consequence of his act. *Prosser* v. *Bromage*, 4 B. & C. 247. In such instances, therefore, it is unnecessary to give evidence of malice in fact or actual malice, unless it may be by the way of aggravating the damages. In other cases, the occasion and circumstances of the speaking and publishing repel the action either peremptorily and absolutely, or unless express malice exist; and in this latter class of cases, where actual malice is essential to the action, it lies on the plaintiff to prove the fact. Where the burthen of proving express malice is thus thrown upon the plaintiff, he may give in evidence any expressions of the defendant, whether they be oral or written, which indicate spite and ill will, for the purpose of showing the temper and disposition with which he made the publication complained of.

It has, however, been held, that other words or libels are not admissible evidence to show the *quo animo*, unless they relate to the same subject. An action was brought for a libel published in a periodical work called the *Satirist* or *Monthly Meteor*, which stated (*inter alia*) that the plaintiff being prosecuted by the Attorney-general, had fled the country that he might save himself from the pillory. To prove the malicious motive of the defendant, the plaintiff's counsel proposed to read extracts from a subsequent number of the *Satirist*, but Sir J. Mansfield, C. J., rejected them all except one which had immediate reference to the former libel. *Finnerty* v. *Tipper*, 2 Camp. C. 72. But it is to be remarked, that in this case there was no doubt as to the animus; the publication was clearly libelous in itself, and the occasion of publishing did not render proof of malice in fact necessary. As nothing turned upon the defendant's real intention, the evidence was inadmissible; for it is perfectly clear that subsequent libels can not be received in evidence with a view to enhance the damages, for they are substantive and independent causes of action. And in the subsequent case of *Stuart* v. *Lovell* (2 Starkie's C. 93), where the publication declared on was clearly libelous, Lord Ellenborough, C. J., rejected evidence offered of the publication of subsequent libels, observing that such evidence would certainly be admissible to show the intention of the defendant were it at all equivocal, but that they were not admissible for the purpose of enhancing the damages. A case, therefore, of equivocal intention, as where the question depends on the existence of malice in fact, differs widely in this respect from one which admits of no doubt on the subject. Where such a doubt exists, and where the material question in the cause is whether the defendant was justified by the occasion or acted from express malice, it seems, in principle, that any circumstances are admissible which can elucidate the transaction and enable the jury to correctly con-

they tend to establish the intent of the party in doing the act in question.[1] And this rests upon the obvious ground, that often it is the only mode of showing the existence in the mind of a deliberate design to do a certain act. The design in him once proved, may properly lead to the conclusion that it is continued and

clude whether the defendant acted fairly and honestly according to the occasion, or *mala fide* and vindictively, for the purpose of causing evil consequences.

In an action for a malicious prosecution of an indictment for perjury, evidence was admitted of an advertisement published by the defendant pending the prosecution, although an information had been granted for publishing that advertisement. *Chambers* v. *Robinson*, Str. 691.

In an action imputing perjury, the plaintiff was allowed to prove that subsequently to the speaking of the words the defendant had preferred an indictment against him. But in such cases the jury are not to consider the effect of such evidence in measuring the amount of damages, but merely as a circumstance to prove malice.

It was once doubted whether, in admitting evidence of this nature, a distinction ought not to be made between words not actionable in themselves and those which are so. In the case of *Mead* v. *Daubigny*, Peake's C. 125, Lord Kenyon rejected evidence of words actionable in themselves and not mentioned in the declaration; but his lordship afterwards changed his opinion and admitted such evidence in a subsequent case. *Lee* v. *Hudson*, Peake's C. 166.

In *Russell* v. *Macquister*, 1 Camp. 49, evidence of actionable words spoken after the time of those laid in the declaration, was objected to on the ground that if such words were taken into consideration by the jury, the defendant might be made to pay a double compensation for the same injury, since another action might be brought for the words last spoken and the distinction between that case and the case of words not actionable. But Lord Ellenborough, C. J., overruled the objection, observing that though such a distinction had once prevailed, it was not founded in principle, and that, although no evidence can be given of any special damage not laid in the declaration, yet, that any words or any act of the defendant is admissible to show the *quo animo* he spoke the words which are the subject of the action.

Upon the same priciple, where a libel was contained in a political paper published weekly by the defendant, after proof that the paper in question had been purchased at the defendant's office, evidence was admitted of the previous sale of other papers with the same title at the same office; and the reason of admitting it was to show that the papers which purported to be weekly publications of public transactions were sold deliberately and vended in the regular course of circulation; that the paper containing the libel was not published by mistake, but vended publicly, deliberately, and in regular transmission for public perusal.

In an action where any words or other libels not specified in the declaration are offered in evidence, the defendant is at liberty to prove the truth of the charges or imputations which they contain, for he had no opportunity of pleading the truth in justification. Starkie on Slander, 53, 54, etc.

[1] Roscoe's Cr. Ev. 3 Amer. Ed. 99.

carried into effect.[1] Where intent or motive is the subject of inquiry, it is impracticable to lay down any rule so as to confine the evidence within any precise limits.[2]

CHAPTER XX.

ADMISSIBILITY OF EVIDENCE OF GENERAL CHARACTER.

UNDER this head will be considered the admissibility of evidence of general character.

The English cases are opposed to the admission of proof of general character in civil cases unless the general character is involved in the issue by the very nature of the action. Thus, in an action of slander for imputing a felony, and for a malicious prosecution where the defendant justified, evidence of the plaintiff's good character was in this case refused; but from the report of the case it does not appear that the defendant had attempted to support his justification that he had spread upon the record by evidence. If such justification had been attempted to be supported by evidence on the part of the defendant, no reason is perceived why proof of general character would not have been admissible on the part of the plaintiff upon the same ground that it would have been admissible to repel the charge on the trial of an indictment.[3]

Where there is a plea of probable cause, followed by evidence in its support, on answer to an action for a malicious prosecution, there the character of the plaintiff is directly in issue, and he may, of course, prove his general good character in cases where the crime in question is infamous. It will be perceived that general character may be put in issue in a variety of ways, besides those of the common case of slander or libel,[4] where it is to a

[1] 2 Phillips' Ev. 3 Amer. Ed. 95.

[2] Roscoe's Cr. Ev. 3d American Ed. 9.

[3] *Cornwall* v. *Richardson*, Ry. & Wood *Nisi Prius* Case, 305.

[4] The question is, was it proper to give in evidence publications made after the libel? It has not been objected that they were libelous; and the plaintiff's counsel put their right to reading them on the ground that they afforded evidence of the defendant's malice in the original publication. The *nisi prius* decisions on this point are somewhat contradictory. All of them agree that in actions for written or verbal slander, other and posterior publications or words, not action-

greater or less extent involved. Cases of criminal conversation, seduction, and breach of promise of marriage are familiar instances. So in some cases of property and in actions of tort,

able, may be given in evidence to show malice. In *Rustell* v. *Maquister*, 1 Camp. N. P. 48 in the notes, Lord Ellenborough said that although there had been formerly such a distinction, it was not founded on any principle; that any words as well as any act of the defendant may be given in evidence to show *quo animo* he spoke the words, but that the judge should tell the jury to give damages only for the words which were the subject of the action.

In Mead and Daubigny, Peake's N. P. 126, and *Cook* v. *Field*, 3 Esp. N. P. Cas. 33, Lord Kenyon refused to permit words actionable, spoken afterwards, to be given in evidence. But in *Lee* v. *Huson*, Peake, 166, in an action for a libel the same judge suffered other libelous papers to be given in evidence.

Perhaps this is not the occasion to lay down any rule on the subject, it not being necessary to this case, nor do the Court mean to do it. But I should think it incorrect to suffer distinct libelous matter to be given in evidence, for though the judge might instruct the jury not to give damages for such libels, yet it would imperceptibly influence their judgments as to the damages, and thus the defendant might be twice punished for the same offense.

On the point of misdirection, the judge's charge is objected to in three respects: 1. In leaving a question of law to the jury, whether the plaintiff had violated his duty in leaving Washington and soliciting the office of treasurer. 2. That the innuendoes give a sense not warranted by the context in this, that the libel did not amount to the charge that the plaintiff was guilty of the crime of receiving a quantity of counterfeit money, with intent to pass the same, knowing it to be counterfeit, and that on this ground the judge ought to have charged the jury to find for the defendant. 3. That the defendant's publication of the plaintiff's trial was substantially true; that its object was to animadvert on the legislature, and, therefore, it ought to have been submitted to the jury whether there was malice in the defendant towards the plaintiff, as evidenced by the libel.

It must be a matter of fact whether the plaintiff's leaving Washington and coming to Albany, for the office of treasurer (if he did so) was or was not a violation of duty; and this would depend upon the circumstance whether he had leave of Congress to absent himself or not. Unexplained, it is to be presumed that he had such permission. It can not be pretended that a member of Congress is so far bound to yield his personal attendance, that absence with leave of the body to which he belongs is a violation of duty. Congress have the right to enforce the attendance of members, and they have a right to dispense with such attendance; Congress are the judges, and no man is obnoxious to the charge of abandoning his duty there, who leaves it by permission; but this question is at rest by the verdict of the jury.

An innuendo, as has been often decided, can not add or enlarge, extend or change the sense of the previous words; and the matter to which it alludes must always appear from the antecedent parts of the declaration; but when the new matter stated in an innuendo is not necessary to support the action, it may be rejected as surplusage. 1 Chitty, 383; 9 East, 93; *Roberts* v. *Camden*.

charging the defendant with gross depravity and fraud upon circumstances merely, evidence of uniform integrity and good character are oftentimes the only testimony which a defendant can oppose to suspicious circumstances.[1] Thus, evidence affecting the previous general character of the wife or daughter in regard to chastity is receivable in an action by the husband or father for seduction, provided it refers to a time subsequent to the act complained of. In criminal cases, where the evidence adduced for and against a prisoner is nearly balanced, the defendant may give in evidence proof of good character, which may be very important for his defense, though the prosecution has no right to introduce evidence tending to impeach the defendant's character until the defendant has attempted in the first instance to sustain it. Until then the prosecution must be confined to

The judge admitted the defendant's right to publish a correct account of the plaintiff's trial, but limited this right to the publication of a true history of it; and he stated that the defendant had put the plaintiff's acquittal solely on the ground that Gibbs, the only witness, stood in the light of an accomplice, when it appeared that his credit was otherwise materially impeached, and that on this ground the plaintiff was entitled to recover.

There is not a *dictum* to be met with in the books, that a man, under the pretense of publishing the proceedings of a court of justice may discolor and garble the proceedings by his own comments and constructions so as to effect the purpose of aspersing the characters of those concerned. In the case of *Stiles* v. *Nokes*, 7 East, 493, the Court laid down the true distinction, and whilst they admitted that a fair account of judicial proceedings might be published with impunity, they held that the writer could not introduce his own comments, insinuating the commission of perjury. It is impossible to read the libel in this case without understanding that the defendant meant to insinuate that the plaintiff had received the counterfeit money with intent to pass it. But it is said that the animadversion was not on the plaintiff, but on the legislature for appointing the plaintiff treasurer without investigation. How was the legislature blamable for making the appointment unless the indictment and trial of the plaintiff, as published by the defendant, held up the plaintiff as probably guilty, notwithstanding his trial and acquittal? If the only witness stated himself to be an accomplice, and was otherwise totally discredited, from the infamy of his character and his malice towards the plaintiff (and on these grounds the plaintiff was acquitted), what investigation was to be made? I am perfectly satisfied that the libel contains a highly colored account of the proceedings, that it suppresses for bad purposes material facts, and that it conveys insinuations of the plaintiff's guilt, unauthorized by the trial and the facts which transpired at the time of the trial; and if so, the inference of malice was inevitable. *Thomas* v. *Croswell*, 7 John. 269.

[1] *Ruan* v. *Perry*, 3 Caines, R. 120.

evidence tending to prove the offense complained of. Where evidence of general character is admitted, it ought to bear upon, and have reference to, the nature of the charge made against the accused. Thus, the defendant will not be permitted to prove that the plaintiff is reputed a common prostitute when the words charged in an action of libel or slander were that she was a thief.[1] Where proof of general character is resorted to it must be confined to the proof of character before the commission of the act complained of and to the estimation in which the person is held

[1] This is a case of slander. The following is the opinion of the Court, by Marcy, J.: It is said the judge erred in refusing testimony of the bad character of the plaintiff subsequent to the speaking of the words laid in the declaration.

It is a well established principle, that the defendant in an action of slander may mitigate damages where he has not justified by proving the general bad character of the plaintiff before and at the time of uttering the slanderous words imputed to him, but proof of bad character subsequent to that time is not admissible. 2 Campb. R. 251; Starkie's Ev. pt. 4, 369, 878. Although the bad character which the defendant offered to prove as existing subsequent to the words spoken was of such a description that it could not have been caused by a belief of the charge made by the defendant, that circumstance should not induce the Court to extend the rule of law on this subject beyond the limits established by the authorities referred to, because if such was known to be the rule, defendants might indirectly contribute to the reputation of the plaintiffs' bad characters for the very purpose of reducing the damages in actions of slander already instituted against them.

Jones, one of the defendant's witnesses, went to Owego, the former residence of the plaintiff, to learn her character and to subpœna witnesses to prove such character while she resided at that place, and the defendant offered to prove by him that he learned while at Owego that her character was bad; but the judge refused to admit this evidence. This mode of establishing the plaintiff's bad character seems to be unusual, and, as a general rule, there is much reason to fear it would prove a very unsafe one. The general character is the estimation in which a person is held in the community where he has resided, and ordinarily the members of that community are the only proper witnesses to testify as to such character. It would be unsafe to rely upon the testimony of the defendant's agent sent into that community, an entire stranger, it may be, to collect information to subserve the defendant's views in the suit. Such witness would not speak of his knowledge of the plaintiff's character or give his own opinion in relation thereto, but barely state his conclusion upon the information received from others. This would be hearsay evidence and nothing more. Evidence of character is founded on opinion, and a witness testifying as to the general character. Phil. Ev. 209–212. His testimony was, therefore, properly refused by the judge. For the same reason the evidence of what two persons from Owego (who had at another Circuit attended as witnesess for the defendant in this cause) related was very properly rejected. *Douglass* v. *Tansey*, 2 Wendell, 355.

in the community where he resides; and such proof must ordinarily come from members of that community, as they are the only proper witnesses to testify to such character. A distinction is made between allegations of fraud that put the character in issue where the allegations are involved by the plea only and in allegations of fraud founded upon the nature of the action.[1] Such evidence is not received in actions of assault and battery, nor in actions of assumpsit, nor in trespass on the case for malicious prosecution, except where the offense involves the charge of an infamous crime.

It is a rule of law, that in the prosecution of any cause, neither party shall be permitted to give evidence of any matter which is not in issue, because the other party would have no opportunity of encountering this evidence by opposing testimony, the issue being formed for the purpose of notifying the parties of what they will be called upon to meet.

Consistently, however, with this rule, the plaintiff's rank and condition in life may be given in evidence in an action of slander because it is an issue, for the knowledge of it may be necessary to a just assessment of the damages, and because it is a fact, in its nature, of general notoriety. But the rule will not admit evidence of the particular facts in the defendant's statements, for the knowledge of particular facts is not useful even in the assessment of damages.[2]

[1] *Anderson* v. *Long*, 10 Sergeant & Rawle R. 55; *Patter* v. *Webb et al.* 6 Greenl. R. 14; *Gregory* v. *Thomas*, 2 Bibb. 286.

[2] In the case of *Larned* v. *Buffinton*, the Court, by Parsons C. J., say: This action is on the case for malicious prosecution and for defamatory words charging the plaintiff with stealing the defendant's horses. The defendant pleaded the truth of the words in justification, and issue was joined on a traverse of this plea, and a verdict found for the plaintiff.

The defendant moves for a new trial because evidence proper to mitigate the damages was rejected by the judge, and because he misdirected the jury on the subject of damages; and on these two grounds exceptions are filed. The defendant failing in his justification, proposes to prove in mitigation of damages, the manner and condition of the plaintiff's life, and that previous to the cause of action his general character for honesty, integrity, and fair dealing was not good. Evidence of this nature was not admitted by the judge.

On the argument it was observed by the Court that a general statement of evidence proposed to be given, without producing witnesses to testify agreeably to the statement, was not regular, and the defendant was called upon to state the

facts he was ready to prove. He accordingly stated by affidavit, that he at the trial had witnesses to prove "that the plaintiff left his father, a few years since, before he was of age, and without any property; that since that time he had been a roving single man, without any fixed place of residence for any great length of time, and without having any regular business, having lived in Boston, Wilbraham, Springfield, Middleton, Worthington, and Northampton; that he has in some of those places been considered as a drover, in others a butcher, and in a very circumscribed manner had followed those branches of business, but that the principal part of his time had been employed in buying, selling, and exchanging horses in the different parts of this and adjacent States; and that he was without real estate, and that in the manner of gaining subsistence and in his grade and standing in society, he was below mediocrity."

After this statement the Court, in forming their opinion, have considered evidence of these facts as regularly offered by the defendant and as rejected by the judge.

As the defendant has not stated that any evidence was offered touching the plaintiff's moral character, it is not necessary to give an opinion whether such evidence would have been legal. But we are of opinion that the plaintiff may give in evidence, to aggravate the damages, his own rank and condition of life, and also that the defendant may avail himself of such evidence when it will have a legal tendency to mitigate the damages, and that this may be done either on the general issue or on a traverse of the justification, because the degree of injury the plaintiff may sustain by the defamation may very much depend upon his rank and condition in society.

It is a rule of law, that in the prosecution of any cause neither party shall give evidence of any matters which are not in issue, because the other party will have no opportunity of encountering this evidence by opposing testimony.

Consistently with this rule, the plaintiff's rank and condition in life may be given in evidence because it is in issue, as a knowledge of it may be necessary to a just assessment of damages, and because it is a fact in its nature of general notoriety. But the rule will not admit evidence of the particular facts in the defendant's statement, or the plaintiff must be considered as at all times prepared to give a history of his places of abode and of his occupation during a great part of his life, even in his minority, and to have with him his title to real estate if he has any. Neither does the knowledge of the facts appear useful in the assessment of damages, unless, perhaps, to aggravate them by proving to the jury that the plaintiff was very generally known among his fellow-citizens, and that from this circumstance the injury from the slander would be more extensive.

We are now to consider whether the plaintiff's rank and condition in life, which the defendant offered in evidence, would have had, in this case, any legal tendency to mitigate the damages.

The allegation that the plaintiff's manner of gaining subsistence, and that his station and condition in society was below mediocrity, when connected with the other allegations in the defendant's statements would, if proved, satisfy the jury that the plaintiff gained his subsistence by buying, selling, and exchanging horses in this and the neigboring States; or, in other words, that he was a horse jockey. Now, from the nature of this action and from the evidence in the cause,

it is not easy to presume that the jury had not evidence of these facts. It was the interest of the plaintiff they should have this evidence, as its tendency in this case would rather have been to aggravate the damages. A man with the reputation of a horse stealer is ruined as a dealer in horses. With this character hanging on him, no man would trust him to try a horse, and no man would buy a horse of him through fear he should buy a stolen one. We are, therefore, of opinion that this evidence, if given by the defendant, would have no legal tendency to mitigate the damages, and consequently he is not injured by its rejection.

The defendant has also excepted against the direction of the judge because he charged the jury that considering the circumstances which had been proved, the manner of speaking the words, and especially the justification of the defendant on record, no evidence whatever could be considered in mitigation of damages.

We are satisfied that evidence of certain facts and circumstances may be received under the general issue which ought to be rejected under this justification. In the former case the defendant may prove that the words were spoken through heat or passion, and not from malice; or that they were spoken with an honest intention through mistake, and not with a design to injure the plaintiff. But if the defendant, when called upon to answer in a court of law, will deliberately declare in his plea that the words are true, he precludes himself from any attempt to mitigate the damages by any of those facts or circumstance, because his plea of justification is inconsistent with them. *Jackson* v. *Stetson et al.* 15 Mass. 48; *Alderman* v. *French*, 1 Pick. 1.

But we are not prepared to declare that there are no facts or circumstances from which the jury may mitigate the damages under a special justification of the truth of the words in which he shall fail. When, through the fault of the plaintiff, the defendant, as well at the time of speaking the words as when he pleaded his justification, had good cause to believe they were true, it appears reasonable that the jury should take into consideration this misconduct of the plaintiff to mitigate the damages. The direction of the judge excepted against is predicated not only on the plea of justification, but also on the circumstances which had been proved in the case. He has, therefore, at the request of the Court, furnished us with a report of the evidence in the cause.

From this report it substantially appears that the plaintiff had several horses at the defendant's stable in Worthington at livery; that all the horses were the property of the plaintiff except a black horse which was the joint property of the parties; that the plaintiff wanted the black horse to match one of his own, and that the defendant wanted him for the same purpose; that the plaintiff practiced finesse in removing the horses from the defendant's stable, and, in fact, removed them without the defendant's knowledge to Mills's stable, distant about half a mile; that the next day the defendant knew they were at Mills's stable, and was there with the plaintiff trying to adjust the controversy, and offered the plaintiff to arbitrate it, which he refused; that about two days afterwards the plaintiff took all his horses and went on with them to the eastward; that the defendant followed him, and might have arrested him at Northampton, but declined it because he might attach more property when the plaintiff had gone further on; that the defendant arrested him at Belchertown on a writ which he did not prosecute; that at about the time of the arrest, and also after the plaintiff was in

custody, he repeatedly uttered the defamatory words; that about the same time he told a witness that the horses were not his, except the black horse, which was half his, but that it was best to use policy.

From considering the report of the evidence we are satisfied that the judge's direction, predicated on this evidence, was right. It does not appear that the defendant ever supposed that the defamatory words were true. He knew that all the horses were the plaintiff's except the black horse, and of him that the plaintiff was part owner. This he declared, but said it was necessary to use policy. Indeed, the inference is that he knew the words were not true, for at Mills's he did not charge the plaintiff with theft, but attempted to settle the dispute and offered to arbitrate it. Afterwards, when he has had time for reconsideration and to obtain the information of counsel as to the law as applied to the fact, he comes into court and publicly puts the slander on record.

It is our opinion that a new trial be not granted, and that judgment be rendered according to the verdict, with the additional damages and costs as consented to by the defendant in his agreement on file. *Larned* v. *Buffinton*, 5 Mass. 546.

In the case of *Inman* v. *Foster*, the Court say, by Savage, C. J., that the case does not state what were the words nor the nature of the charge they contain, neither does it state what was the evidence given in defense. I must take it for granted that the defendant did not name his author when he uttered the slanderous words.

The first question is, whether he should have permitted, in mitigation of damages, to prove that Brown told him the story which he reported. It was resolved in Northampton's case (12 Co. 134), "that if J. S. publish that he hath heard J. M. say that J. G. was a traitor or thief, in an action of the case, if the truth be such he may justify." In *Davis* v. *Lewis*, 7 T. R. 17, Lord Kenyon says, "If a person say that such a particular man [naming him] told him certain slander, and that man did in fact tell him so, it is a good defense to an action to be brought by the person of whom the slander was spoken, but if he assert the slander generally, without adding who told it to him, it is actionable." The same rule is found in *Maitland* v. *Golding*, 2 East, 436, and *Woodworth* v. *Meadows*, 5 East, 469, in such case the words must be given, so as to give an action against the person who first uttered them. This is denied to be law by this Court, in *Dole* v. *Lyon*, 10 John. R. 447. Kent, C. J., says, "Words of slander with the name of the author, may be repeated with malicious intent, and with mischievous effect." The slander may derive all its effect from the character of the person who repeats it, and the author may be utterly irresponsible. In the case of *Woodworth* v. *Meadows*, the boy who made the complaint and told the story was only nine years old: of what avail is a right of action against such an originator? In the case of *Dole* v. *Lyon*, it was established that the publisher of a libel, with the name of the author, was liable to an action, notwithstanding the name of the author. In *Lewis* v. *Walton*, 4 Barn. & Old. the doctrine of Northampton's case is qualified to a publication, on a fair and justifiable occasion, without malice. It is not contended in this case, that the fact offered to be proved was a justification, but only a circumstance in mitigation; when the slander was published no name was given. It is in that respect like *Mills & wife* v. *Spencer & wife*, Holt, 532; 3 Com. Law R. 177; the defendant

had pleaded according to Northampton's case and the others referred to, that a certain person had communicated the slander, and that the name had been given at the time of speaking the words. On the trial the defendant's counsel did not attempt to support these pleas, but offered evidence that the defendant's wife had heard the charge from other persons, and made the communication by way of caution; this was offered in mitigation, and it was argued on the authority of Leicester's case, that it diminished the malice. Gibbs, C. J., said that Leicester's case stood on evidence of general suspicion; but this was a proposition to mitigate damages by showing that the specific slander was communicated by a third person; the slander imputed was stated as a fact of the defendant's own knowledge, and she can not, when called to answer for it, say another person told me so. If an action be brought against A for calling B a thief, it is no defense for A, under the general issue, to prove that he was told so by C; A is answerable for the full measure of his slander. He adds, "If he qualifies his charge, or annexes to it, at the time of uttering it, his author [naming him] it opens another consideration. General reports have been admitted in mitigation of damages, but not specific facts." In this Court we neither receive general reports nor specific facts, as has been decided in several cases. Both stand on the same principle, unless by general report is meant general character. This evidence has been admitted in Pennsylvania in *Kennedy* v. *Gregory*, 1 Bin. 85, and *Morris* v. *Duane*, p. 90, upon the authority of the English cases, which were rejected by Chief-Justice Gibbs. The same evidence has been rejected in Connecticut in *Treat* v. *Browning*, 4 Conn. R. 415. Chief-Justice Hosmer says, "The Court rejected evidence offered to prove in mitigation of damages, that prior to the publication of the words by the defendant Catherine, she had heard them from a Mrs. Browning; and this has given rise to another objection. The cases which have been decided on this subject do not harmonize; but the preponderance of the determinations, in my judgment, is against the admission of the proffered testimony." He then cites most of the cases on the point, and concludes by stating that the testimony was a surprise upon the plaintiff, and it was far more just that the defendant who had made an unqualified charge on the plaintiff should be answerable for the full measure of her slander.

In *Coleman* v. *Southwick*, 9 John. 48, the defendant offered to prove information he had received from a third person, and it was rejected chiefly on the ground that the person himself who gave the information was the best witness to prove it; the attention of the Court does not appear by the report of the case to have been drawn to the inadmissibility of the testimony as improper in itself; but Kent, C. J., remarks, "That the Pennsylvania cases have extended the English rule. In the case of *Dole* v. *Lyon*, which was subsequent, it was held that testimony of a similar quality could not be received. The case of *Maps* v. *Weeks*, 4 Wendell, 659, is in point. According to the rule of this Court, which I have shown is also the rule of the English Court, as well as the courts of Connecticut and Massachusetts, the testimony offered was rightly rejected Although such evidence may tend to diminish the malice, yet it does not disprove it; and the effect it is calculated to produce on the plaintiff is to render his character suspicious. Its tendency is, if not to prove the truth, yet to create suspicions of the plaintiff's guilt, when the defendant dare not prove it; and, therefore, such testimony is inadmissible.

The second point is, that the judge erred in excluding reports. On this point I shall not enter into any argument; the question is settled in this Court. *Matson* v. *Bush*, 5 Cowen, 499; *Root* v. *King*, 7 id. 613; 6 Mass. R. 514; 4 Wendell, 659; and *Gilman* v. *Lowell*, *ante*, 573. The third point raised at the trial was not insisted on upon the argument, as even if wrong no injury was sustained; it was wrong so far as it was admitted to sustain the action, and right so far as to prove malice. 4. Words were received to support malice that were uttered more than two years before suit was brought. It is stated in Buller's *Nisi Prius*, p. 7, that after the plaintiff has proved the words as laid, he may give evidence of other expressions made use of by the defendant as proof of his ill will towards him. The cases in England on this point are *nisi prius* decisions. Words not laid are given in evidence, not to sustain the action, it is said, but to show malice, the *quo animo* the words laid in the declaration were spoken; and in this point of view it is immaterial whether they are actionable or not, provided they show malice. In some of the cases the plaintiff was confined to words not actionable, spoken after the words laid in the declaration; in others, any words have been received spoken at any time, but when subsequent actionable words are proved, it is said the jury should be cautious not to give damages for such words. (Peake's *Nisi Prius*, 22, 75, 125, 166; 1 Campb. 48; Starkie on Slander, 398; 3 Binney, 550. Were this question free from embarrassment on the ground of authority, I should think with Chief-Justice Tilgman, and with Chief-Justice Spencer, 7 John. R. 270, that the practice is dangerous; for though the jury are charged not to give damages for such words they may be imperceptibly influenced by them. And why should evidence be given to the jury which is not to influence the verdict? the actionable words laid and proven sustain the action; they imply malice; then why prove more malice but to enhance damages? and yet the jury are told not to give damages for such words; at most, then, they are given to prove malice, which was before sufficiently proven. There is certainly less danger in proving words spoken two years before, for which no action can be brought, than words spoken subsequently, and after suit brought, for which another action may be sustained. Upon authority, however, such words were properly received. In *Thomas* v. *Croswell*, Chief-Justice Spencer doubts the propriety of proving subsequent libels, yet such evidence was given in that case, and a new trial was refused, thereby giving sanction to the receiving of such evidence. It does not distinctly appear, however, in that case whether the subsequent publications were libelous or not. 5. Evidence was admitted to prove the plaintiff's general character. In general, such evidence is improper, unless the defendant has attempted to impeach the plaintiff's character. 2 Starkie's Ev. 370, 869; 5 Pick. 246; and in this case the judge gave as a reason for receiving the evidence that the plaintiff's reputation had been in some measure attacked by the evidence produced by the defendant; in that point of view it was proper.

I am of opinion that a new trial should be denied. *Inman* v. *Foster*, 8 Wendell, 606.

Walcott v. *Hall*, 6 Mass. 514; *Ross* v. *Lapham*, 14 Mass. 275; *Sawyer* v. *Eifert*, 2 Nott & M'Cord, 511.

CHAPTER XXI.

PRESUMPTIVE EVIDENCE.

In the present chapter it is proposed to treat of the nature and quality of evidence in regard to presumptions of law and fact as contradistinguished from direct proof. It often happens that the facts proven are not the precise facts in issue; but from the facts proven we come to a conclusion upon the facts in issue. Facts in issue, therefore, are said to be established by presumptive evidence when they can not be positively known but can be reasonably presumed or inferred from one or more other facts or circumstances which are known or proved.[1]

[1] To constitute a reasonable presumption, a previous experience of the connection between the known and inferred facts is essentially of such a nature that as soon as the existence of the one is established, admitted, or assumed, an inference as to the existence of the other arises independently of any reasoning on the subject. It follows, that an inference may be certain or not certain, but merely probable, and therefore capable of being rebutted by contrary proof. In general, a presumption is more or less strong according as the fact presumed is a necessary, usual, or infrequent consequence of the fact or facts seen, known, or proven. When the fact inferred is the necessary consequence of the fact or facts known, the presumption amounts to a proof; when it is the usual but not the invariable consequence, the presumption is weak; but when it is sometimes, though rarely, the consequence of the fact or facts known, the presumption is of no weight. *Menthuel sur les Conventions*, tit. 5. See Damat. liv. 9, tit. 6.

Presumptions are either legal and artificial or natural. Legal or artificial presumptions are such as derive from the law a technical or artificial operation and effect beyond their mere natural tendency to produce belief and operate uniformly without applying the process of reasoning upon which they are founded, to the circumstances of the particular case. For instance: at the expiration of twenty years, without payment of interest on a bond or other acknowledgment of its existence, satisfaction is to be presumed; but if a single day less than twenty years has elapsed, the presumption of satisfaction from mere lapse of time does not arise. This is evidently an artificial and arbitrary distinction. An example of another nature is given under this head by the civilians. If a mother and her infant at the breast perish in the same conflagration, the law presumes that the mother survived and that the infant perished first on account of its weakness, and on this ground the succession belongs to the heirs of the mother.

Legal presumptions are of two kinds: first, such as are made by the law itself, or presumptions of mere law; secondly, such as are to be made by a jury, or presumptions of law and fact. Presumptions of mere law are either absolute and conclusive, as, for instance, the presumption of law that a bond or other

The ground of all presumptions is the necessary or usual connection between facts and circumstances, the knowledge of which connection results from experience and reflection. Presumptions are, therefore, inferences as to the existence of a fact not actually known, arising from its necessary or usual connection with other facts which are known. It is upon this principle, that all our knowledge of those relations and existences which are not perceptible to the human senses must depend upon the force of presumptions, which in many instances are almost intuitively perceived by mankind. That faculty of the mind which prepares it to expect the future association of circumstances because it has been accustomed to find them associated, can not be accounted for except by reference to the law of nature. It is the same faculty that leads us to reason upon cause and effect in all the regions of inductive philosophy, of which the doctrine of presumptive evidence ranks as an important branch. Thus the presumptions of a malicious intent to murder from the deliberate use of a deadly weapon; also the presumption of aquatic habits in an animal found with web feet. These belong to the same philosophy,

specialty was executed upon a good consideration, can not be rebutted by evidence so long as the instrument is not impeached for fraud (4 Burr. 2225), or they are not absolute and may be rebutted by evidence; for example, the law presumes that a bill of exchange was accepted upon a good consideration, but that presumption may be rebutted by proof to the contrary.

Presumptions of law and fact are such artificial presumptions as are recognized and warranted by the law as the proper inferences to be made by juries under particular circumstances; for instance, an unqualified refusal to deliver up the goods on demand made by the owner does not fall within any definition of a conversion, but inasmuch as the detention is attended with all the evils of a conversion to the owner, the law makes it, in its effects and consequences, equivalent to a conversion, by directing or advising the jury to infer a conversion from the facts of demand and refusal.

Natural presumptions depend upon their own form and efficacy in generating belief or conviction on the mind as derived from these connections which are pointed out by experience; they are wholly independent of any artificial connections and relations, and differ from mere presumptions of law in this essential respect, that those depend, or rather are a branch of the particular system of jurisprudence to which they belong; but mere natural presumptions are deprived wholly, by means of the common experience of mankind, from the course of nature and the ordinary habits of society. Bouvier's Law Dictionary, Vol. 2, 375.

differing only in the instance and not in the principle of its application.

Presumptive evidence must be as admissible in criminal prosecutions as in civil cases; for whether the proceeding be of a criminal or civil nature, the modes of drawing conclusions from facts, and the methods of reasoning, are necessarily the same. When direct evidences of fact are not attainable—which frequently happens in some of the worst forms of crime—reasonable minds will necessarily form their judgments from circumstances and act on the probabilities of the case. As mathematical certainty is seldom to be obtained in human affairs, reason and public necessity require that judges and other tribunals should form their opinion of the truth of facts from the superior number of probabilities on the one side or the other, whether the amount of these probabilities be expressed in words or by figures. The principal difference between criminal and civil cases with reference to the mode of proof by circumstantial or direct evidence is, that in the former a greater degree of probability may be safely required as the ground of judgment where life and liberty are concerned than in the latter. In criminal prosecutions, it has been observed that the circumstances, in order to warrant a conviction, should be such as to produce nearly the same degree of certainty as that which arises from direct evidence.[1] Doubtless the circumstances ought to be of such a nature as not to be usually accounted for on the supposition of the prisoner's innocence, but perfectly reconcilable with the supposition of the accused's guilt. In some cases circumstantial evidence may produce a stronger degree of evidence of the guilt of the accused than could have been produced by direct and positive testimony. This was strikingly illustrated in the case of Isaac Burkly, tried at Norwalk Spring Assizes, 1816, for the murder of Ann Smith, a female fellow-servant at a farm-house. The deceased, who was about to go into another situation, asked the accused to carry a box for her to the Goodman House, about a quarter of a mile distant. A little before seven o'clock in the evening the deceased went on an errand to take some corn to a neighboring house, but it not being

[1] Bennett's Tr. on the Criminal Law of Scotland, 525.

wanted she set out to return with it. Soon after the deceased set out for her master's house the accused followed her, carrying the box, but he did not reach the gardener's house until after eight o'clock. The time was fixed from the circumstance of the gardener's clock having stopped soon after the accused left the house. The deceased did not return home, and on the following morning she was found drowned in a pit near a foot-path leading from the gardener's house to her master's. One of her shoes and the bag in which she had carried the corn were found near the pit. There was some corn scattered about near the spot, also some wheat and chaff, and there were also marks of much tramping on and about the spot where the corn, wheat, and chaff were scattered. These were material facts, as the prisoner was engaged, the previous day, in threshing wheat. The prisoner also gave a false account of his whereabouts during his temporary absence the preceding evening. Impressions were found in the soil, which was stiff and retentive, of the knee of a man who had on breeches made of striped corduroy and patched with the same material, the patch not being set on straight, the ribs of the patch met the hollow between the ribs of the garment on which it had been placed, which circumstance exactly corresponded with the prisoner's dress. As a general principle, however, it is certainly true that positive evidence of a fact from credible eye-witnesses is the most satisfactory proof that can be produced, and the universal feeling of mankind leans to this species of evidence in preference to that which is merely circumstantial. When the fact itself can not be proved, that which comes nearest to the proof of the facts is the proof of the circumstances which necessarily or usually attend such facts, and which are called presumptions, and not proofs, of the facts, till the contrary be proved.

Presumptions are divisible into two classes: presumptions of law and presumptions of fact. Presumptions of law are again divisible into conclusive and disputable; but there are fewer instances in the law of conclusive presumptions than formerly. Under conclusive presumptions may be classed statutes of limitation, also statutes for the prevention of fraud and circumvention. The possession of personal property by the vendor after a sale thereof is conclusively presumed to be fraudulent, or, in other words, fraudulent *per se*. When a crime is known to have been

committed, presumptive evidence is admissible to show who committed it. And in some cases presumptions of facts have been received in proof of the *corpus delicti*,[1] as well as to fix

[1] Every allegation of the commission of legal crime involves the establishment of two distinct propositions; namely, that an act has been committed from which legal responsibilities arise, and that the guilt of such act attaches to a particular individual.

Such a complication of difficulties occasionally attends the proof of crime, and so many cases have occurred of convictions for alleged offenses which have never existed, that it is a fundamental and inflexible rule of legal proceedings, of universal obligation, to require satisfactory proof of the *corpus delicti*, either by direct evidence or by cogent and irresistible grounds of presumption. *Rex* v. *Burdett*, 4 B. & Ald. 123, before it is permitted to adduce evidence tending to implicate any particular individual. If it be objected that rigorous proof of the *corpus delicti* is sometimes unattainable, and the effect of exacting it must be that crimes will occasionally pass unpunished, it must be admitted that such may possibly be the result; but it is answered that, where there is no proof, or, which is the same thing, no sufficient legal proof of crime, there can be no legal criminality. In penal jurisprudence there can be no middle term; the party must be absolutely and unconditionally guilty or not guilty. Nor, under any circumstances, can considerations of supposed expediency ever supersede the immutable obligations of justice; and occasional impunity of crime is an evil of far less magnitude than the punishment of the innocent. Such considerations of mistaken policy led some of the writers on the civil and canon laws to modify their rules of evidence, according to the difficulties of proof incidental to particular crimes, and to adopt the execrable maxim, that the more atrocious the offense, the slighter was the proof necessary; *in atrocissimis leviores conjecturæ sufficient et licet judici jura transgredi.* Such, indeed, is the logic and the inevitable consequence when, from whatever motive, the plea of expediency is permitted to influence judicial integrity. The clearest principles of justice require that whatever the nature of the crime, the amount and intensity of the proof shall in all cases be such as to produce the full assurance of moral certainty. Lord Chancellor Nottingham, on the trial of Lord Cornwallis, said, "The fouler the crime is, the clearer and the plainer ought the proof to be." 7 St. Tr. 149. "The more flagrant the crime is," said Mr. Baron Legge, "the more clearly and satisfactorily you will expect that it shall be made out to you." *Rex* v. *Blandy*, 18 St. Tr. 1186. Mr. Justice Holroyd said that, "The greater the crime the stronger is the proof required for conviction. *Rex* v. *Hobson*, 1 Lewin's C. C. 261. In another case Mr. Justice Bayley, in even stronger terms, told the jury that, "In proportion of the heinousness and malignity of the offense, there ought to be a reasonable degree of certainty in the proof, and that where there is nothing but the evidence of circumstances, those circumstances ought to be closely and necessarily connected, and to be made out as clear as if there were absolute and positive proof." *Rex* v. *Downing*, Salop Summer Assizes, 1822.

But it is clearly established, that it is not necessary that the *corpus delicti*

the criminal liability upon the perpetrator; but to allow presumptions in order to swell an equivocal and ambiguous fact into a criminal one is an entire misapplication of the doctrine of pre-

should be proved by direct and positive evidence, and it would be most unreasonable to require such evidence. Crimes, and especially those of the worst kinds, are naturally committed at chosen times, and in darkness and secrecy. And human tribunals must act upon such indications as the circumstances of the case present or admit, or society must be broken up. Nor is it very often that adequate evidence is not afforded by the attendant and surrounding facts, to remove all mystery, and to afford such a reasonable degree of certainty as men are daily accustomed to regard as sufficient in the most important concerns of life; to expect more would be equally needless and absurd. In Burdett's Case, 4 B. & Ald. 121, this subject underwent much discussion, and was elaborately treated by the bench. Mr. Justice Best said, "When one or more things are proved from which experience enables us to ascertain that another, not proved, must have happened, we presume that it did happen, as well in criminal as in civil cases. Nor is it necessary that the fact not proved should be established by irrefragable inference. It is enough if its existence be highly probable, particularly if the opposite party has it in his power to rebut it by evidence, and yet offers none; for then we have something like an admission that the presumption is just. It has been solemnly decided that there is no difference between the rules of evidence in civil and criminal cases. If the rules of evidence prescribe the best course to get at truth, they must be and are the same in all cases and in all civilized countries. There is scarcely a criminal case from the highest down to the lowest in which courts of justice do not act upon this principle." His lordship added: "It therefore appears to me quite absurd to state that we are not to act upon presumption. Until it pleases providence to give us means beyond those our present faculties afford of knowing things done in secret, we must act on presumptive proof or leave the worst crimes unpunished. I admit where presumption is intended to be raised as to the *corpus delicti*, that it ought to be strong and cogent." Mr. Justice Holroyd said: "No man is to be convicted of any crime upon mere naked presumption. A light or rash presumption, not arising either necessarily, probably, or reasonably from the facts proved, can not avail in law. But crimes of the highest nature, more especially cases of murder, are established, and convictions and executions take place frequently thereupon for guilt most convincingly and conclusively proved upon presumptive evidence only of the guilt of the party accused: and the well-being and security of society must depend upon the receiving and giving due effect to such proof. These presumptions arising from those proofs should, no doubt, and most especially in cases of great magnitude, be duly and correctly weighed. They stand only as the proofs of the facts presumed till the contrary be proved, and those presumptions are either weaker or stronger, according as the party has or is reasonably to be supposed to have it in his power to produce other evidence to rebut or weaken them, in case the fact so presumed be not true, and according as he does or does not produce such contrary evidence." Mr. Justice Bayley said: "No one can doubt that presumptions may

sumption. Presumptive evidence has been resorted to, however, sometimes for the purpose of testing the truth of positive testimony, especially that presumption which arises from the con-

be made in criminal as well as civil cases. It is constantly the practice to act upon them, and I apprehend that more than one-half of the persons convicted of crime are convicted on presumptive evidence. If a theft has been committed, and shortly afterwards the property is found in the possession of a person who can give no account of it, it is presumed that he is the thief, and so in other criminal cases; but the question always is, whether there is sufficient premises to warrant the conclusion." Lord Chief-Justice Abbott said: "A fact must not be inferred without premises that will warrant the inference; but if no fact could be thus ascertained by inference in a court of law, very few offenses would be brought to punishment. In a great proportion of trials, as they occur in practice, no direct proof that the party accused actually committed the crime is or can be given; the man who is charged with theft is rarely seen to break the house or take the goods; and in cases of murder it rarely happens that the eye of any witness sees the fatal blow struck, or the poisonous ingredient poured into the cup." The law on this point was very emphatically declared by Mr. Baron Parke in Tawell's case. His lordship said: "The jury had been properly told by the counsel for the prosecution, that circumstancial evidence is the only evidence which can in cases of this kind lead to discovery. There is no way of investigating them except by circumstantial evidence. But providence has so ordered the affairs of men that it most frequently happens that great crimes committed in secret leave behind them some traces, or are accompanied by some circumstances which lead to the discovery and punishment of the offender;* therefore the law has wisely provided that you need not have, in cases of this kind, direct proof; that is, the proof of eye-witnesses, who see the fact and can depose to it on their oath. It is impossible, however, not to say that it is the best proof, if that proof is offered to you upon the testimony of men whose veracity you have no reason to doubt; but on the other hand, it is equally true with regard to circumstantial evidence, that the circumstances may often be so clearly proved, so closely connected with it, or leading to one result in conclusion, that the mind may be as well convinced as if it were proved by eye-witnesses." This being a case of circumstantial evidence, "I advise you," said the learned judge, "as I invariably advise juries, to act upon a rule that you are first to consider what facts are clearly, distinctly, and indisputably proved to your satisfaction; and you are to consider whether those facts are consistent with any other rational supposition than that the prisoner is guilty of the offense. If you think that the facts in this case are all consistent with the supposition that the prisoner is guilty, and can offer no resistance to that, except the character the prisoner has borne, and except the supposition that no man would be guilty of so atrocious a crime as that laid to the charge of the prisoner, that can not much

*Ces circonstances sont autant de temoins muets, que la Providence semble avoir places autour de crime, pour fair jaillir la lumiere de l'ombre dans laquelle l'argent s'est efforce d'ensevelir le fait principal; elles sont comme un fanal qui eclaire l'esprit du juge, et le dirige vers des traces certains, qu'il suffit de suivre pour atteindre a la verite. Mit termaier ch. 53.

duct of the parties at the time of the transaction. The *evidentia rei*, as it is sometimes called, will generally be found to lead to a conclusion incompatible with direct testimony where such testimony is invented or exaggerated.[1] Among the various cases where presumptions had been allowed as proof of the *corpus delicti*, and which constitutes, to some extent, an exception to the rule,[2] may be mentioned prosecutions for a divorce or damages

influence your minds; for we all know that crimes are committed, and, therefore, the existence of the crime is no inconsistency with the other circumstances, if those circumstances lead to that result. The point for you to consider is, whether attending to the evidence, you can reconcile the circumstances adduced in the evidence with any other supposition than that he has been guilty of the offense? if you can not, it is your bounden duty to find him guilty; if you can, then you will give him the benefit of such a supposition. All that can be required is not absolute, positive proof, but such proof as convinces you that the crime has been made out."

[1] *Rex* v. *Burdett*, 4 B. & A. 161; *Evans* v. *Evans*, 4 Hag. Con. Rep. 105.

[2] The same general principles of evidence prevail with respect to the proof of crimes of every description and of every element of the *corpus delicti*, and they are so important in reference to circumstantial evidence, that it will be expedient to illustrate their application at some length; and for the sake of brevity and simplicity, the exemplifications will be borrowed from cases of homicide, which are generally those of the greatest difficulty and interest. The discovery of the body necessarily affords the best evidence of the fact of death and of the identity of the individual, and most frequently, also, of the cause of death. A conviction of murder is, therefore, never allowed to take place unless the body has been found or there is equivalent proof of death by circumstantial evidence leading directly to that result; and many cases have shown the danger of a contrary practice. Three persons were executed in the year 1660 for the murder of a person who had suddenly disappeared, but about two years after reappeared. The deceased had been out to collect his mistress's rents, and had been robbed by highwaymen, who put him on board a ship, which was captured by Turkish pirates, by whom he was sold into slavery. *Rex* v. *Perrys*, 14 St. Tr. 1312. Sir Matthew Hale mentions a case where A was long missing, and upon strong presumptions B was supposed to have murdered him and to have consumed the body to ashes in an oven, whereupon B was indicted of murder, and convicted and executed; and within one year afterwards A returned, having been sent beyond sea by B against his will. "And so," that learned writer adds, "though B justly deserved death, yet he was really not guilty of that offense for which he suffered." 2 Hale's P. C. 39. Sir Edward Coke also gives the case of a man who was executed for the murder of his niece, who was afterwards found to be living. Sir Matthew Hale, on account of these cases, says: "I will never convict any person of murder or manslaughter unless the fact was proved to be done, or at least the body found." The judicial history of all nations in all times, abounds with similar warnings and exemplifications of the danger of neglecting these salutary cautions.

on the ground of criminal conversation; cases where both parties always seek concealment and are usually successful in placing themselves beyond the reach of direct testimony; and where courts are thrown, as the only recourse, upon such circumstances as would lead the guarded discretion of a reasonable and just man to the conclusion that the offense had been committed.

A sane man—a voluntary agent—acting upon motives, must be presumed to contemplate and intend the necessary, natural, and probable consequences of his own acts. If, therefore, one voluntarily or willfully does an act which has a direct tendency to destroy another's life, the natural and necessary conclusion from the act is, that he intended so to destroy such person's life. Thus where a dangerous and deadly weapon is used with violence upon the person of another, as this has a direct tendency to destroy life or to do some great bodily harm to the person assailed, the intention to take life or to do him some great bodily harm is a necessary conclusion from the act.[1] If the direct tendency of

[1] But however suddenly any act is done, the intent to do it precedes the doing of it, and the act is done in pursuance of the intent and formed design. However short the interval, the intent necessarily precedes. This is manifest from the ordinary case of a mortal blow given with a deadly weapon immediately upon words of provocation. Words, however aggravating, not being considered a sufficient provocation to extenuate the offense to manslaughter, it is uniformly held to be murder—an act done with malice prepense—and it is not the less preconceived because the act immediately followed the guilty intent. There was obviously no intent to do the act of violence until the provocation was offered, and although it is said the act of resentment follows immediately, yet such is the rapidity with which the mind operates and forms its purposes, and so instantaneously does the hand execute the purposes of the will, that the moment which intervenes is sufficient for the operation of the malignant motive. Otherwise the suddenness of the mortal blow, on provocation however slight, must exclude the implication of malice. But the law in such cases does impute malice to the act, because it does not consider the weight of the provocation such as naturally to arouse so violent a resentment; and as an act so violent and cruel can not be attributed to a natural resentment incident to the infirmity of human nature—on which ground alone it can extenuate the homicide—it is necessarily attributed to malignity of heart.

Malice, in the definition of murder, is imputed to an act done willfully, *malo animo*, an act wrong in itself, injurious to another, and for which there is no apparent justification or excuse. Such justification or excuse must depend on the existence of facts, and such facts must be proved and found in order to be the basis of any judicial decision. The willful and voluntary act of destroying the life of another is an act wrong and unlawful in itself, injurious in the highest degree to

the willful act is to do another some great bodily harm, and death in fact follows as a natural and probable consequence of

the rights of another, being the greatest wrong which can be done to him, contrary to the laws of nature as well as society, and in violation of the plainest dictates of conscience. The natural and necessary conclusion and inference from such an act willfully done without apparent excuse are, that it was done *malo animo*, in pursuance of a wrongful, injurious purpose, previously, though perhaps suddenly, formed, and is therefore "a homicide with malice aforethought," which is the true definition of murder. And it appears to us that this is not a forced, arbitrary, technical, or artificial presumption of law, but a natural and necessary inference from the fact. This will be more apparent from considering what malice, in legal contemplation, is, and how it is inferred from illegal and wrongful acts in other cases of crimes and offenses of less magnitude.

Malice, although in its popular sense it means hatred, ill-will, or hostility to another, yet, in its legal sense, has a very different meaning, and characterizes all acts done with an evil disposition, a wrong and unlawful purpose or motive, the willful doing of an unlawful and injurious act without lawful excuse.

Mr. Justice Bayley, in giving the opinion of the Court in *Bromage* v. *Prosser*, 4 Barn. & Cress. 255, though on a subject widely different from homicide, thus gives the legal description of malice in contradistinction to the popular sense in which the term is commonly used: "Malice, in common acceptation, means ill-will against a person; but in its legal sense it means a wrongful act done intentionally without just cause or excuse. If I give a perfect stranger a blow likely to produce death, I do it of malice because I do it intentionally and without just cause or excuse. If I maim cattle without knowing whose they are, if I poison a fishery without knowing the owner, I do it of malice, because it is a wrongful act and done intentionally. If I am arraigned of felony and willfully stand mute, I am said to do it of malice, because it is intentional and without just cause or excuse." This is sometimes called malice in law in contradistinction from malice in fact, because the law draws the inference from the fact. So in civil actions and prosecutions for minor offenses, some authorities in our own books, and in recent cases, illustrate this legal doctrine of malice. In *Wills* v. *Noyes*, 12 Pick. 324, the Court charged the jury that legal malice might differ from malice in the common acceptation of the term; that to do a wrong or unlawful act, knowing it to be such, constituted legal malice. This was affirmed by the whole Court, who say that whatever is done "with a willful disregard of the rights of others, whether it be to compass some unlawful end or some lawful end by unlawful means, constitutes legal malice." So in a more recent case—*Commonwealth* v. *Snelling*—15 Pick. 340—the Court, after noticing the legal and popular meaning of the term "malice," say: "In a legal sense, any act done willfully and purposely to the prejudice and injury of another which is unlawful is, as against that person, malicious." See, also, Foster's Crown Law, 256; Russell on Crimes (1st ed.), 614, note.

These instances, taken from cases having no analogy to the crime of homicide, are adduced to show that the presumption of malice, from a wrongful and injurious act willfully done, when applied to homicide is not technical or artifi-

the act, it is presumed that he intended such consequence; hence

cial, or invented for the particular occasion, but is the result of a mode of legal reasoning which is of general application.

The same doctrine is laid down as the undoubted law of England in a recent work of good authority, frequently republished and in extensive use in this country (2 Stark. Ev. 903), in which the writer states the general doctrine I have been stating, that "malicious" imports nothing more than the wicked and perverse disposition with which the party committed the act; and he illustrates the general proposition by a reference to this presumption of malice in the case of homicide. His words are, "The application of the term 'malicious' is strongly illustrated in the case of homicide, where the *malus animus*, which brings the offense within the denomination of willful murder is frequently to be collected by the Court as a matter of law from the circumstances of the case, and is not an inference of fact to be drawn by the jury, as it must necessarily be whenever malice consists in the specific intention actually existing in the mind of the agent at the time of the act." And it is remarkable that Mr. Greenleaf, whose recent treatise on evidence is to be regarded rather as a discussion and statement of the grounds and the principles of the theory of proof in general than as a detail of the rules of evidence, puts forth this same presumption of malice, not as an arbitrary and technical rule, but as a natural inference, drawn by a fair course of reasoning from the laws of nature, the experienced course of human conduct and affairs, and the connection usually found to exist between certain things, and, in this respect standing on the same footing as inferences from the known laws of nature. He adds, "The general doctrines of presumptive evidence are not, therefore, peculiar to municipal law, but are shared by it in common with other departments of science. Thus, the presumption of a malicious intent to kill, from the deliberate use of a deadly weapon, and the presumption of aquatic habits in an animal with webbed feet, belong to the same philosophy, differing only in the instance and not in the principle of its application." 1 Greenleaf on Ev. § 14. He then distinguishes between those that are conclusive and not capable of being rebutted by proof, and those which are disputable and may be overcome by opposing proof. Of the latter the following is the illustration: Thus, on a charge of murder, malice is presumed from the fact of killing unaccompanied with circumstances of extenuation, and the burden of disproving the fact is thrown on the accused. § 34. I shall have occasion hereafter to state more fully that the term "deliberate," as used in the first of these passages, does not, in its legal acceptation, so much import an act done after time for reflection as a voluntary act—an act done upon motives of purpose and design, in contradistinction to acts done in the heat of passion, a paroxysm of resentment, in which reason and choice, for the moment, have no agency. The books constantly speak in this connection of a deliberate act, however sudden; whereas if deliberation implied time and reflection, a deliberate act could never be sudden. So it has been held in Pennsylvania under a statute which requires premeditation to constitute murder in the first degree, that the intention to kill, though immediately executed, is still the true criterion of the crime, and that the intention of the party can only be collected from his words and actions. *Republica* v. *Mulatto Bob*. 4 Dall. 146. And in various other cases under the

he must stand legally responsible for it. So the deliberate publi-

statute it has been decided that where it appears from the whole evidence that the crime was, at the moment, deliberately or intentionally executed, the killing is murder. *Commonwealth* v. *Daugherty*, 1 Browne, Appx. xviii.; *Pennsylvania* v. *M'Fall*, Addison, 257.

I will add a few other authorities, to show that the inference of malice from unlawful acts is not an artificial rule of law, but a natural inference, legitimately deduced from facts admitted or proved, and that it is not peculiar to the law of homicide, but prevails in all other departments of the criminal law. In *The King* v. *Dixon*, 3 M. & S. 11, the defendant was indicted for delivering bread mixed with unwholesome and noxious materials as good and wholesome bread for the use of the children of the Royal Military Asylum at Chelsea. There was a motion in arrest for the cause, among other things, that the indictment did not show that the defendant intended to injure the children's health; whereupon Lord Ellenborough said "it was a universal principle that when a man is charged with doing an act of which the probable consequence may be highly injurious, the intention is an inference of law resulting from the doing of the act; and here it was alleged that he delivered the loaves for the use and supply of the children." In *The King* v. *Philip*, 1 Mood. Cr. Cas. 263, the prisoner was charged with burning a ship of which he was part owner, the primary purpose being to defraud the underwriters; but the evidence not being produced to prove the fact of insurance, that intention was not proved. But there were counts charging the accused with burning the ship, of which he was also master, with an intent to injure the other part owners, and the case proceeded on them. It was argued by the counsel for the prisoner that the intention to defraud his co-proprietors was not proved, but that a different intent was shown. But it was answered and resolved by the Court, that voluntarily setting fire to the ship and destroying her, was a willful act; that it tended to a destruction of the property of the others; and that it was a necessary inference of law that he intended to injure them. The case of *The King* v. *Farrington*, Russ. & Ry. 207, is to the same effect.

There is a very recent case to the same point—*The Queen* v. *Hill*, 8 Car. & P. 274. On the trial of an indictment before Mr. Baron Alderson, the prisoner was charged with uttering a forged bill of exchange, with intent to defraud Samuel Minor. The counsel for the prisoner, in addressing the jury, submitted that on the evidence they ought to negative the intent to defraud, because there was evidence, as he contended, that the prisoner intended himself to take up the bill. The learned judge told the jury that the questions for them were whether the defendant uttered the bill as a true bill to Minor, and whether, if he did so, he knew when he did so that it was forged; and he instructed them, that if they should find these two facts, then they ought to find, as a necessary consequence of law, that the prisoner meant to defraud. "A man," said he, "must be taken to intend the consequences of his own acts, and must intend to defraud if he pays another a false note instead of a real one." And this decision was affirmed by the fifteen judges. See also *The King* v. *Sheppard*, Russ. & Ry. 169.

That one shall be presumed to intend the results and natural consequences of his own acts was decided in the remarkable case of *The King* v. *Woodburne & Coke*, in 1722, referred to in most of the books on crown law, and reported at

cation of a libel, or the uttering of slanderous words known to be false raises a presumption of malice.[1]

large in 16 Howell's State Trials, 54. The indictment was found on the Coventry Act, charging the accused with lying in wait, and attacking Edward Crisp, with a sharp and heavy instrument called a bill, with intent to maim and disfigure him; and proof of this intent was necessary to bring the case within the act. The proof was that they conspired to murder him; struck him repeated blows with a hedge bill, in his face and on his head, by which his nose was slit, and left him for dead; but that he afterwards recovered. The ground taken by Coke was, that the act was done not with an intent to disfigure, but to murder. But it was answered and resolved that, striking a man in the face with such a weapon, with the ultimate purpose of murdering him, had a direct tendency to maim and disfigure him, and, therefore, he must have intended that result; and he was convicted and executed. *Commonwealth* v. *York*, 9 Metcalf, 103.

[1] By the Court. Although the evidence rejected does not seem to be very material, yet as the fact offered to be proved might, at the time of the speaking of the words, have had some influence in misleading the defendant, he had a right to prove it for the purpose of reducing the malice.

There is a difference between a justification and an excuse. The one goes to the right of recovery, the other to the amount to be recovered. For the purpose of showing malice the plaintiff may prove the speaking of words not charged, if they be not actionable; and with a view of extenuating malice, the defendant may prove, under the general issue, any circumstance connected with the transaction tending to show that he had probable ground for believing the truth of the words.

In estimating the damage, the degree of malice is always to be considered. Any circumstance, therefore, tending to show that the defendant spoke the words under a mistake, or that he had some reason to believe they were true, is entitled to consideration, and is proper evidence to be received in mitigation. What effect this evidence might have we know not, nor is it necessary to know. We are satisfied it was legal, and that the defendant had a right to use it for the purpose for which it was offered. *Wilson* v. *Apple*, 3 Ohio, 270.

According to Mansfield, C. J., a repetition of the same words or the same libel may be proved, to show that the first was not heedless but malicious. *Bodwell* v. *Swan*, 3 Pick. 378. See also *Kean* v. *M'Laughlin*, 2 Serg. & Rawl, 469; *Macleod* v. *Wakley*, 3 Carr. & Payne, 311; *Shock* v. *M'Chesney*, 2 Yeates, 473; *M'Almont* v. *M'Clellan*, 14 Serg. & Rawle, 359; *Miller* v. *Kerr*, 2 M'Cord. 285; *Eccles* v. *Shackleford*, 1 Littell, 35; *Duvall* v. *Griffith*, 2 Har. & Gill, 30; 2 Starkie's Ev. 465.

Where words were given in evidence by the plaintiff, in order to prove a malicious intent by the defendant, which were not stated in the declaration, it was held that the defendant might prove the truth of such words. *Warne* v. *Shadwell*, 2 Stark. R. 457.

In Kentucky the general currency of a report is not a justification of slander; but evidence of the general reputation is admissible in extenuation of malice and in mitigation of damages. *Calloway* v. *Middleton*, 2 Marshall, 372.

It is said that the records of courts of justice are conclusively presumed to have been correctly made—*res judicatæ pro veritate accipiuntur*, and a party to the record is presumed to have been interested in the suit; but this presumption arising in favor of records, and judicial proceedings is subject to this that the judgment may be inquired into in all instances where there is a want of jurisdiction in the court rendering it.[1]

[1] The Act of Congress, which was passed 26th of May, 1790, after providing for the mode of authenticating the acts, records, and judicial proceedings of the States, declares: "and the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the States from whence the said records are or shall be taken." It has been supposed that this act, in connection with the Constitutional provision which it was intended to carry out, had the effect of rendering the judgments of each State equivalent to domestic judgments in every other State, or, at least of giving to them in every other State the same effect, in all respect, which they have in the State where they were rendered. And the language of this Court in *Mills* v. *Duryee*, 7 Cranch, 484, seemed to give countenance to this idea. The Court held in that case that the act gave to the judgments of each State the same conclusive effect as records in all the States, as they had at home; and that *nil debet* could not be pleaded to an action brought thereon in another State. This decision has never been departed from in relation to the general effect of such judgments where the questions raised were not questions of jurisdiction. But where the jurisdiction of the Court which rendered the judgment has been assailed, quite a different view has prevailed. Justice Story, who pronounced the judgment in the case of *Mills* v *Duryee*, in his Commentary on the Constitution (Sec. 1313), after stating the general doctrine established by that case with regard to the conclusive effect of judgments of one State in every other State, adds: "But this does not prevent an inquiry into the jurisdiction of the Court in which the original judgment was given, to pronounce it; or the right of the State itself, to exercise authority over the person or the subject matter. The Constitution did not mean to confer [upon the States] a new power or jurisdiction, but simply to regulate the effect of the acknowledged jurisdiction over persons and things within their territory." In the Commentary on the Conflict of Laws (Sec. 609), substantially the same remarks are repeated with this addition: "It [the Constitution] did not make the judgments of other States domestic judgments to all intents and purposes, but only gave a general validity, faith, and credit to them, as evidence. No execution can issue on such judgments without a new suit in the tribunals of other States. And they enjoy not the right of priority or lien which they have in the State where they are pronounced, but that only which the *lex fori* gives to them by its own laws in their character of foreign judgments." Many cases in the State Courts are referred to by Justice Story in support of this view. Chancellor Kent expresses the same doctrine in nearly the same words, in a note to his Commentaries, Vol. i, p. 281. See also Vol. ii, 95, note and

After a verdict, it will be presumed that those facts, without proof of which the verdict would have been different, have been proved, provided the record contains terms sufficiently general to

cases cited. "The doctrine in *Mills* v. *Duryee*," says he, "is to be taken with the qualification that in all instances the jurisdiction of the court rendering the judgment may be inquired into, and the plea of *nil debet* will allow the defendant to show that the court had no jurisdiction over his person. It is only when the jurisdiction of the court in another State is not impeached, either as to the subject matter or the person, that the record of the judgment is entitled to full faith and credit. The court must have had jurisdiction, not only of the cause but of the parties, and in that case the judgment is final and conclusive." The learned commentator adds, however, this qualifying remark: "A special plea in bar of a suit on a judgment in another State, to be valid, must deny by positive averments, every fact which would go to show that the court in another State had jurisdiction of the person or of the subject matter."

In the case of *Hampton* v. *M'Connel*, 3 Wheaton, 234, this Court reiterated the doctrine of *Mills* v. *Duryee*, that "the judgment of a State court should have the same credit, validity, and effect in every other court of the United States which it had in the State courts where it was pronounced, and that whatever pleas would be good to a suit therein in such State, and none other, could be pleaded in any court in the United States." But in the subsequent case of *M'Elmoyle* v. *Cohen*, 13 Peters, 312, the Court explained that neither in *Mills* v. *Duryee*, nor in *Hampton* v. *M'Connel*, was it intended to exclude pleas of avoidance and satisfaction, such as payment, statute of limitations, etc., or pleas denying the jurisdiction of the court in which the judgment was given, and quoted with approbation the remark of Justice Story, that "the Constitution did not mean to confer a new power of jurisdiction, but simply to regulate the effect of the acknowledged jurisdiction over persons and things within the State." The same views were repeated in *The United States* v. *Arredonde*, 6 Peters, 691; *Vorhees* v. *Bank of the United States*, 10 Peters, 475; *Wilcox* v. *Jackson*, 13 Peters, 511; *Shriver's Lessee* v. *Lynn*, 2 Howard, 59, 60; *Hickey's Lessee* v. *Stewart*, 3 Howard, 762; and *Williamson* v. *Berry*, 8 Howard, 540. In the last case the authorities are reviewed and the Court say, "The jurisdiction of any court exercising authority over a subject may be inquired into in every other court when the proceedings in the former are relied upon and brought before the latter by a party claiming the benefit of such proceedings," and "the rule prevails whether the decree or judgment has been given in a court of admiralty, chancery, ecclesiastical court, or court of common law, or whether the point ruled has arisen under the laws of nations, the practice in chancery or the municipal laws of States."

But it must be admitted that no decision has ever been made on the precise point involved in the case before us, in which evidence was admitted to contradict the record as to jurisdictional facts asserted therein, and especially as to facts stated to have been passed upon by the Court. But if it is once conceded that the validity of a judgment may be attacked collaterally by evidence showing that the Court had no jurisdiction, it is not perceived how any allegation con-

comprehend them in fair and reasonable intendment. Upon the same principle a specialty or commercial paper is presumed to have been made upon a good consideration. So a court is presumed to have jurisdiction of the person and of the cause of action, even though the court entertaining such presumption will not take notice, *ex officio*, of the laws of the State or government conferring such jurisdiction.[1]

tained in the record itself, however strongly made, can affect the right to question it. The very object of the evidence is to invalidate the paper as a record. If that can be successfully done no statements contained therein have any force. If any such statements could be used to prevent inquiry, a slight form of word might always be adopted so as effectually to nullify the right of such inquiry. Recitals of this kind must be regarded like asseverations of good faith in a deed, which avail nothing if the instrument is shown to be fraudulent. The records of the domestic tribunals of England and some of the States, it is true, are held to impart absolute verity as well in relation to jurisdictional as to other facts, in all collateral proceedings. Public policy and the dignity of the courts are supposed to require that no averment shall be admitted to contradict the record. But, as we have seen, that rule has no extra territorial force.

It may be observed that no courts have more decidedly affirmed the doctrine that want of jurisdiction may be shown by proof to invalidate the judgments of courts of other States than have the courts of New Jersey. The subject was examined and the doctrine affirmed after a careful review of the cases, in the case of *Moulin* v. *Insurance Company*, in 4 Zabriskie, 222, and again in the same case in 1 Dutcher, 57; and in *Price* v. *Ward*, 1 Dutcher, 225; and, as lately as November, 1870, in the case of *Mackay et al.* v. *Gordon et al.* 34 New Jersey, 286. The judgment of Chief-Justice Besley in the last case is an able exposition of the law. It was a case similar to that of *D'Arcy* v. *Ketchum*, in 11 Howard, being a judgment rendered in New York, under the statutes of that State before referred to, against two persons, one of whom was not served with process. "Every independent government," says the Chief-Justice, "is at liberty to prescribe its own methods of judicial process and to declare by what forms parties shall be brought before its tribunals. But in the exercise of this power, no government, if it desires extra territorial recognition of its acts, can violate those rights which are universally esteemed fundamental and essential to society. Thus, the judgment by the court of a State against a citizen of such State in his absence and without any notice, express or implied, would, it is presumed, be regarded in every external jurisdiction, as absolutely void and unenforceable. Such would certainly be the case if such judgment was so rendered against the citizen of a foreign State."

On the whole, we think it clear that the jurisdiction of the court by which a judgment is rendered in any State may be questioned in a collateral proceeding in another State, notwithstanding the provision of the fourth Article of the Constitution and the law of 1790, and notwithstanding the averments contained in the record of the judgment itself. 18 Wallace, 461; *Thompson* v. *Whitman*.

[1] Scates, C. J., delivered the following opinion on this question, namely: The

There is another class of presumptions that may be properly considered in this connection, to wit: presumptions that are entertained in favor of intermediate proceedings, where the principal facts are provable by record or judicial registration; the maxim in such case being *probatis extremis præsumitur media*, the meaning of which is, that it will be presumed that all of the intermediate proceedings have been lost from lapse of time; but this rule does not extend to records and public documents which are supposed always to remain in the possession of the proper custodian.[1] Neither does the presumption prevail where special

plaintiff was sued before a justice, and judgment rendered against him on appeal to the Circuit Court for $79.62, "for his ——— as per the verdict," etc., which had omitted to specify whether they found debt or damages. The proof shown in support of this finding was the exemplification of a record of a Court of Common Pleas in Knox County, Ohio, commenced before a justice of the peace there, before whom plaintiff appeared and defended, and afterward taken by appeal to the Common Pleas, where defendant here recovered a judgment for $60.

The first and most important question presented is the plaintiff's right to go behind his judgment into the original cause of action, or is he concluded by his judgment? The act of Congress under the Constitution has given this judgment the same force and effect as evidence in every State as it has in Ohio where rendered. Act 26 May, 1790; Rev. Stat. 1845, p. 624.

While judgment rendered without due notice or appearance is a nullity (*Bimeler* v. *Dawson et al.* 4 Scam. R. 536), or without jurisdiction of the person or cause of action, yet where the court has jurisdiction of both, the judgment will be conclusive upon the parties. And this is as applicable to foreign as to domestic judgments.

The doubt did not arise as to the principle of law, but whether the facts presented a case for its application to cut off plaintiff from denying the original cause of indebtedness. We are of the opinion, that the record is conclusive upon the plaintiff. The plaintiff was personally served, and appeared before the justice of the peace in Ohio. Although no further service or appearance is shown in the Common Pleas to which the cause was taken by appeal, and admitting that plaintiff could have shown that there was neither, yet the judgment rendered by the Common Pleas we think *prima facie* evidence of jurisdiction by appeal, and the plaintiff should rebut this presumption by showing that the laws of Ohio required another service to the Common Pleas. *Horton* v. *Critchfield*, 18 Ills. 135.

[1] Morton, Judge, delivered the opinion of the Court: As the records are apparently entire and no loss of any of the papers in the probate office is suggested, we can not, even after the lapse of more than thirty years, presume that any decree passed or that any notice was given which does not appear. *Hathaway* v. *Clark*, 5 Mass. 491. See also, *Brown* v. *Wood*, 17 Mass. 68; *Shirley* v. *Lunenburg*, 11 Mass. 379; *Oliver* v. *Hondlet*, 13 Mass. 239; *Armstrong* v. v. *Short*, 1 Ruffin, 11.

powers, conferred upon a court of general jurisdiction, are brought into action in a special manner not according to the course of the common law; nor where the general powers of the court are exercised over a class not within its ordinary jurisdiction. Upon the performance of prescribed conditions, a presumption of jurisdiction will not attend the judgment of the court, and the facts essential to the exercise of the special jurisdiction must, in such cases, appear upon the record.[1]

[1] When, therefore, by legislation of a State constructive service of process by publication is substituted in place of personal citation, and the court, upon such service, is authorized to proceed against the person of an absent party not a citizen of the State nor found within it, every principle of justice exacts a strict and literal compliance with the statutory provisions. And such has been the ruling, we believe, of the courts of every State in the Union. It has been so held by the Supreme Court of California in repeated instances. In *Jordan* v. *Giblin* (12 California, 100), decided in 1859, service by publication was attempted, and the Court said that it had already held, "in proceedings of this character, where service is attempted by modes different from the course of the common law, that the statute must be strictly pursued to give jurisdiction. A contrary course would encourage fraud and lead to oppression." In *Ricketson* v. *Richardson* (26 California, 149), decided in 1864, the Court, referring to the sections of the statute authorizing notice by publication, said: "These sections are in derogation of the common law, and must be strictly pursued in order to give the Court jurisdiction over the person of the defendant. A failure to comply with the rule there prescribed in any particular is fatal where it is not cured by an appearance." In *M'Minn* v. *Whelan* (27 California, 300), decided in 1866, the plaintiff in ejectment traced his title from one Maume. The defendants endeavored to show that the title had passed to one of them under a previous judgment against Maume. This judgment was recovered against Maume and others, who were non-residents of the State, upon service of summons by publication. It appeared from the record, that a supplemental complaint had been filed in the action, and that the summons published was issued upon the original complaint, and not after that had been superseded by the supplemental complaint. It was objected that the publication thus made was insufficient to give the Court jurisdiction of the persons of the absent defendants. The objection was answered by the position that the judgment could not be questioned collaterally, for the reason that the jurisdiction of a court of general or superior jurisdiction would be presumed in the absence of evidence on the face of the record to the contrary. But the Court held the objection well taken, and after referring to the case of *Peacock* v. *Bell* (1 Saunders, 74), said that that case "involved the question of jurisdiction as to the subject matter of the action and not as to the person of the defendant; and it may be doubted if a case can be found which sanctions any intendment of jurisdiction over the person of the defendant when the same is to be acquired by a special statutory mode without personal service of process. If jurisdiction of the person of the defendant is to be acquired by

There is another class of presumptions which properly falls under the head of conclusive presumptions, or, as they are termed in the law, estoppels, and have their foundation in the obligation that men are under to assert the truth, and for the promotion of confidence between men in their intercourse with each other. They are not at liberty to deny what they have deliberately spoken as truth. The principle of estoppel is constantly guarded, and is never extended by implication, because estoppels may exclude the truth. No one should be prohibited from setting up the truth unless it is in plain and clear contradiction of his former acts or declarations. Hence, in order to be able to exercise the aid of this rule, the former acts or declarations must be certain to every intent in particular. In the application of the doctrine of estoppel, it oftener arises on recitals of deeds, bonds, and other specialties than otherwise, and the general rule is thus: all parties to a deed, bond, or specialty, are concluded by

publication of the summons in lieu of personal service, the mode prescribed must be strictly pursued." But it is said that the Court exercises the same functions and the same power whether the service be made upon the defendant personally or by publication, and that, therefore, the same presumption of jurisdiction should attend the judgment of the Court in the one case as in the other. This reasoning would abolish the distinction in the presumptions of law when applied to the proceedings of a court of general jurisdiction acting within the scope of its general powers, and when applied to its proceedings had under special statutory authority. And, indeed, it is contended that there is no substantial ground for any distinction in such cases. The distinction, nevertheless, has long been made by courts of the highest character, both in this country and in England, and we had supposed that its existence was not open to discussion. "However high the authority to whom a special statutory power is delegated," says Mr. Justice Coleridge, of the Queen's Bench, "we must take care that in the exercise of it the facts giving jurisdiction plainly appear, and that the terms of the statute are complied with. This rule applies equally to an order of the Lord Chancellor as to any order of Petty Sessions. *Christie* v. *Unwin*, 3 Perry & Davison, 208. "A court of general jurisdiction," says the Supreme Court of New Hampshire, "may have special and summary powers, wholly derived from statutes, not exercised according to the course of the common law, and which do not belong to it as a court of general jurisdiction. In such cases its decisions must be regarded and treated like those of courts of limited and special jurisdiction. The jurisdiction in such cases, both as to the subject matter of the judgment and as to the person to be affected by it, must appear by the record; and every thing will be presumed to be without the jurisdiction which does not distinctly appear to be within it." *Galpin* v. *Page*, 18 Wallace, 369.

See also *Morse* v. *Presley*, 5 Foster, 302; also *Harvey* v. *Tyler*, 2 Wallace, 332.

the recitals therein. It also binds privies in blood, privies in estate, and privies in law, by which is meant those who come in by successive relationship under the deed, bond, or other specialty. Between such parties and privies the matter recited need not be otherwise proved. The recital in the subsequent deed, bond, or other specialty being conclusive, and as between such parties and privies it is primary evidence, which can not be contradicted. Thus, the recital of a lease in a deed of release, is conclusive evidence of the existence of the lease against both parties and privies. There are cases in which a recital in a deed may be used in evidence even against a stranger. If, for instance, there is the recital of a lease in a deed of release, and in a suit against a stranger the title under the release comes in question, then the recital of the lease in such release is not, *per se*, evidence of the existence of the lease; but if the existence and loss of the lease be established by other evidence, then the recital is admissible as secondary proof in the absence of more perfect evidence to establish the contents of the lease. And if the transaction be an ancient one, and the possession has been long held under such release, and is not otherwise to be accounted for, then the recital will, of itself, under such circumstances, materially fortify the presumption from lapse of time and length of possession of the original existence of the lease.[1]

A covenant of warranty estops the grantor or feoffor from setting up any after acquired title against the grantee, for the reason that the covenant runs with the land and is a perpetually operating covenant. Thus, it would seem, where a deed was made to Church wardens, who were not a corporation clothed with power to hold lands, for certain purposes, that the deed did not operate by way of grant to convey a fee to the Church wardens and their successors, as such, they could not take, nor could they take in their natural capacity. But the covenant of general warranty in the deed binding the grantors and their heirs forever, and warranting the land to the Church wardens and their successors forever, may well operate by way of estoppel to confirm to the Church and its privies the perpetual and

[1] *Carver* v. *Jackson*, 4 Peters, 84.

beneficial estate in the land.[1] The doctrine of estoppel is not limited in its application to deeds and other specialties, but extends to verbal acts and declarations. Thus, where a person holds a contract of purchase of land, and stands by and sees another purchase the same land from his vendor and fails to make known any claim in respect to the land, he will be estopped from afterward claiming it against such second purchaser.[2]

[1] *Terrett* v. *Taylor*, 9 Cranch, 257.
[2] *Baehr* v. *Wolf et al.* 69 Ills. 471.

PART FOURTH.

WRITTEN EVIDENCE.

CHAPTER I.

PRELUDE.

WRITTEN evidence, as we have had occasion to remark, is justly regarded as higher and more trustworthy than mere oral evidence. Writings are either public or private. Some public writings are of record, others are not of record. Again, public writings may be classified into such as are of a judicial character, and such as are not judicial.

CHAPTER II.

THE ADMISSIBILITY AND EFFECT OF EVIDENCE OF JUDGMENTS AND VERDICTS, AND OF SENTENCES IN ECCLESIASTICAL COURTS.

RECORDS are the memorials of the proceedings of the legislature and courts of justice. They are considered of such high authority, that no evidence is receivable to contradict them. "A record," said Lord Tenterden, "imports such absolute verity that no person against whom it is admissible shall be allowed to introduce evidence to contradict it; thus, if a verdict finding several issues were to be produced in evidence, the opposite party would not be allowed to show that no evidence was offered in support of one of the issues; and that the indorsement on the *postea* was by mistake.[1] On an indictment for assisting the escape of a

[1] Lord Kenyon, C. J. I think the judge's direction was right on both points. The record was admissible evidence, though between other parties as to the finding upon the right to the public foot way, which was negatived. The defendants in both cases stood in the same relative situation. In the case of customary commoners, a verdict in an action for or against one is evidence for or against another claiming in the same right. So in other cases of public prescription, what

prisoner, if the record of the conviction is produced by the proper officer, evidence is not admissible to dispute or contradict the record, even though the indictment referred to it with a *prout patet per recordum* as remaining among the records. A custodian of a record, whose duty it was to make up the same, may be examined as to who has the care and custody of the record, and as to their condition, but not as to their contents.

A record will not be conclusive, however, as to the truth of allegations which were not material nor traversable. Thus, in the case of a conviction for a crime, where the jury have rendered a general verdict, the record will not be conclusive that the offense was committed on the day mentioned in the indictment, for time is not of the essence or substance of the charge; and therefore a party interested, to dispute the fact may prove that the offense was committed on a different day from that alleged in the record.[1] Where the record of a judgment or verdict offered in evidence is not liable to be contradicted as to the truth of its contents on material and traversable matters contained in it, the question as to its admissibility or effect in evidence must depend upon the inference attempted to be drawn from it. The inferences to be drawn from a record are sometimes necessary and conclusive, and sometimes optional. Where a judgment is produced merely for the purpose of showing that such a proceeding actually took place, as with a view to disqualify a witness by showing that he was convicted of an infamous crime, and that judgment was pronounced upon such conviction, the record is conclusive of the fact of conviction; the fact of conviction, and not the guilt or innocence of the party, being by law made the criterion of incompetency. The legal consequences arising from a judgment having been pronounced by a court of competent jurisdiction are various. In some cases a judgment constitutes a part muniment of title, in others it is used merely to show a suit determined, or to let in evidence of what was sworn to by a deceased witness upon a trial, or to entitle a partner to contribution,

weight the evidence was entitled to is another question; perhaps not too much, and certainly it was not conclusive. But the evidence offered by the defendant went to impeach the authenticity of the record as to the fact of such a finding, and therefore was not admissible. *Reed* v. *Jackson*, 1 East, 357.

[1] *Attorney-General* v. *Ring*, 5 Price, 195.

or to show that a party by process of law has been compelled to pay damages to a certain amount.

A judgment, as a general principle, is evidence between the parties and privies, but it ought not to be binding upon a third party; for it would be unjust to affect any person by a judgment who could not be admitted to make a defense or to examine witnesses or to appeal from a judgment he might think erroneous. There are, however, exceptions to the general rule, founded upon particular reasons, which do not fall within the scope of this treatise. In the Duchess of Kingston's case, Lord Chief-Justice Delsrey in delivering his celebrated judgment, said: "From the variety of causes relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true: first, that a judgment of a court of concurrent jurisdiction directly upon the point, is as a plea in bar, or as evidence conclusive between the same parties upon the same matter directly in question in another court; secondly, that a judgment of a court of exclusive jurisdiction, directly upon the point, is in like manner conclusive upon the same matter between the same parties coming incidentally in question in another court for a different purpose; but neither the judgment of a concurrent nor an exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment." 4 Term R. 590. With reference to the parties between whom judgment and verdict are to be used, and the matters to which they relate, these two classes of judgments are put upon the same footing, and are subject to the same limitation and restriction; that is, the matter must be the same, or, in other words, the subject of inquiry must be the same, and the parties the same. But it is said that a much more conclusive effect should be given to the judgments of courts of exclusive jurisdiction than is to be attributed to the judgments of courts which have only a concurrent jurisdiction. But this seems to us to be a shadow without a substance in either; the judgment where the court had jurisdiction to pronounce it as evidence is conclusive.

A record of a conviction or verdict can not be given in evidence for or against a third party. Even where the benefit

thereof may be material, that is, such as might have been given in evidence either for the plaintiff or defendant. Chief Baron Gilbert laid the rule down to be that no person can claim any advantage by reason of a judgment or verdict who would not have been prejudiced by it, had it gone contrary.[1]

It would seem unjust that proceedings should be evidence against a stranger, who has had no opportunity of calling witnesses, or of cross-examining the witnesses on the other side; or of appealing from the judgment. It may, perhaps, be thought a sufficient reason for not allowing verdicts and judgments as evidence for a stranger even against a party who was engaged in the former suit, that if the stranger had been a party to that suit instead of the person who succeeded in it, the result might have been different under such circumstances. To admit a verdict or judgment as evidence would be giving a party indirectly the benefit of testimony which he might be precluded from using directly in his own cause. This rule is no less applicable to criminal than to civil cases; accordingly where two are indicted separately for the same offense, and one was convicted and judgment passed upon him, it was held by the court in Ohio that the record was not admissible evidence against the other.[2] So, when

[1] Gilb. Ev. 28; *Ward* v. *Wilkinson*, 4 B. & A. 412.

[2] Two persons indicted separately for the same arson, one convicted and judgment passed, the record is not admissible evidence against the other when on trial. After the prosecutor had given some evidence to the jury of a concert between James Terry, Samuel Johnson, a negro, and the defendant, in burning the store, the prosecutor offered in evidence an exemplification of the record of the conviction of Samuel Johnson for his offense, which was objected to, but received, and a bill of exceptions was signed by the Court. The defendant was found guilty by the jury, sentenced by the Court to ten years' imprisonment in the penitentiary, and judgment against him for costs. To reverse this judgment this writ of error was brought.

The plaintiff in error relies principally on the admission of the record of the conviction of Johnson. In admitting this record the Court erred. The record of conviction is evidence whenever the fact of the conviction becomes on trial material. It is the best evidence of that fact as where the prosecutor makes the convict an important witness. Whenever he is offered to testify, the record of the conviction may be produced. In this cause the conviction of Johnson was not material, although Johnson and the defendant had conspired to burn the store, Johnson might have been convicted, and the defendant be not guilty; or acquitted, and the defendant guilty. They might have agreed to burn the store, and the agreement be not consummated. The store, notwith-

defendants, on being sued, pleaded in abatement the non-joinder of others as partners and succeeded on such plea, the record is not admissible in evidence in a subsequent suit, in which such others are joined, to charge them as liable with the rest; but the record is evidence against those who pleaded that all who are alleged to be partners are so in fact.

Mr. Starkie says that "a record is evidence against one who might have been a party to it, for he can not complain of the want of those advantages which he has voluntarily renounced." 1 Starkie Ev. 195. An agreement between several persons liable upon the same instrument to be bound by a verdict against one, may so far connect the rest with the proceedings as to render the verdict admissible in an action against them. Thus, a special verdict, given in another action on the same policy of insurance, but against a different underwriter, has been received where it was shown that all the underwriters had agreed to be bound by one verdict; for under the agreement they are each entitled to interfere on the former trial, and cross-examine witnesses. It was held, however, that such verdict was not conclusive. But a person is not to be affected by a decision between others, merely because he was present at the trial and cross-examined the witness. He must, like a party, have had a full, fair, and previous opportunity to meet the question in controversy.[1]

In the same manner admissions and declarations may be used against the actual parties to the record, though they are not the nominal parties to the record. Verdicts and judgments are receivable in evidence against the parties on whose account the action in which the judgment was obtained was instituted or defended. Thus, in an action for a penalty incurred by destroying fish in the plaintiff's fishery, a verdict for the plaintiff in a former action for a trespass committed in the same fishery against one who justified as servant was admitted to be evidence against the

standing such conspiracy, might be burned by others. Johnson might have been convicted on insufficient testimony. The defendant was not confronted with the witnesses who testified against Johnson; he had no opportunity to cross-examine them. Can he, then, be bound by the inferences drawn by the jury in that case? A juror who tried Johnson would have been rejected, lest he should be influenced by what he heard, and the opinion he then formed. Judgment reversed. *Kazer* v. *The State of Ohio*, 5 Ohio, 280.

[1] *Turpin* v. *Thomas*, 2 Hen. & Munf. 139.

defendant for these reasons, that the defendant in the second suit acted by the command of the same person under whom the defendant in the first action had justified, who was considered to be the true party in both cases.[1] This rule, however, was afterwards criticised by Lord Ellenborough, who questioned the admissibility of the former record in evidence, but denied to it the effect of an estoppel.[2] And Spencer, Justice, in delivering the opinion of the Supreme Court of New York, pronounced the rule laid down in *Kinnersly* v. *Orpe*, *supra*, as irreconcilable with the rules of evidence on any other ground than that both suits were substantially against the same parties. *Case* v. *Reeves*, 14 John. 82. But the rule, although it has often been questioned and sometimes qualified, has never been overruled in England, and has been adhered to in a number of the States in America, and may, therefore, be regarded as receiving the weight of judicial authority and sanction. Upon the same principle a judgment in an action against the sheriff alone, of which his securities had no notice, was held to be *prima facie* evidence of the amount of damages in a subsequent suit upon the recognizance upon the sheriff and his securities jointly, but not conclusive.[3] But in Virginia a wider range has apparently been given to the judgment against the principal, for it seems there to be allowed as *prima facie* evidence against the security on all points established by it.[4] So in covenant upon a general warranty in a deed for land, a judgment by a person claiming title against the vendee, of which the vendor had no notice, was held competent evidence to prove an eviction, but not to establish that such eviction was by title paramount.[5] In an action by the vendee of personal property against the vendor upon a warranty of title, judgment obtained for the property against the vendee by a third person claiming to be the rightful owner in a suit of which the vendor had no notice, can not be given in evidence to prove that the latter had no title.[6]

[1] *Kinnersly* v. *Orpe*, 2 Douglass, 517.

[2] *Outran* v. *Moorwood*, 3 East R. 366.

[3] *Carmack* v. *The Commonwealth*, 5 Binn. R. 184.

[4] *Munford* v. *Overseers*, 2 Rand. R. 313; *Baker* v. *Preston*, 1 Gilmer's R. 235; *Jacobs* v. *Hill*, 3 Leigh R. 393; *Braxton* v. *Winslow*, 1 Washin. R. 31.

[5] *Hooker* v. *Bell*, 3 Bibb, 175; *Prewit* v. *Kenton*, 3 Bibb, 280.

[6] *Stevens* v. *Jack*, 3 Serg. R. 403; *Sanders* v. *Hamilton*, 2 Hayw. R. 226; *Jacob* v. *Price*, 2 Rawle R. 204.

Where the assignee sued the assignor of a chose in action, it was held that a verdict and judgment in favor of the maker at the suit of the assignee in which the jury found that the demand assigned had been paid previous to the assignment, could not be given in evidence unless the assignor had due notice of the first action and an opportunity to meet the defense there set up.[1] But where it is necessary that the assignee, in the exercise of due diligence, should prosecute the maker to judgment and execution, the judgment would be evidence to prove the fact of such diligence. Where a person has a right of recovery secured to him either by operation of law or express contract, and he has given the person so responsible due notice of the suit, that judgment, if obtained without fraud or collusion, will be evidence conclusive in its form against such person upon every fact established by such judgment; and such person can not be viewed in the light of a mere stranger, but he has the same means of controverting the adverse claim as though he were the real or nominal party on the record.[2] Upon this same principle it has been held that

[1] *Maupin* v. *Compton*, 3 Bibb, 214.

[2] *Leather* v. *Paultney*, 4 Bin. R. 352; *Bender* v. *Fromberger*, 4 Dall. 436; *Jacob* v. *Pierce*, 2 Rawle, R. 204.

Parson, C. J.: This is an action of covenant broken on a deed of the defendant's testator conveying one hundred acres of uncultivated land, with general warranty. The plaintiff assigns, as a breach of this covenant, that at the time of the conveyance one Moore was lawfully seized in fee simple of sixty acres, parcel of the said one hundred acres, and that afterwards one M'Crealis, holding Moore's title, had entered into possession of, and evicted the plaintiff from, the said sixty acres. The defendants traverse the eviction, and issue being joined thereon, a verdict is found for the plaintiff. The cause now comes before the Court upon a motion for a new trial by the defendants for a supposed misdirection of the judge at the trial.

The first objection is, that the judge admitted parol evidence to prove the eviction, which the counsel for the defendants contend can only be proved by the record of a judgment at law. And we are all of opinion, that to prove an eviction according to its strict and technical meaning, a judgment of court is necessary. But we are inclined to give to the term a more extended signification, and to understand it in that case as synonymous with ouster.

But, secondly, it is contended that here was no legal evidence of an ouster, because the dispossession took place with the consent of the tenant in possession.

It is true, if the tenant consented to an unlawful ouster he can not afterwards be entitled to a remedy for such ouster. But an ouster may be lawful; and in that case the tenant may yield to a dispossession without losing his remedy on the covenant of warranty which, in this State, is a personal action of

the equitable assignee of a chose in action is estopped by a verdict and judgment thereon in the same manner as if he were a party.

CHAPTER III.

VERDICTS AND JUDGMENTS; WHEN ADMISSIBLE IN EVIDENCE CONSIDERED WITH REFERENCE TO THE PARTIES.

A RECORD of conviction of a principal in the crime of stealing who pleaded guilty is not receivable in evidence against the receiver of the stolen property, nor against an accessory after the fact, for the purpose of proving the guilt of the principal; but if it become material to ascertain whether a conviction, based upon a criminal charge, has been had, as in an action for malicious prosecution or slander, then, as proof of the fact of conviction, the record would be not only admissible but conclusive evidence. But it seems not to be admissible evidence of the guilt of the convict as against another person charged with being connected with him in the commission of the crime. The record in this respect being *res inter alios acta*, and therefore the record is not evidence as against a third person as to the ground upon which the conviction proceeded.

From the rule that verdicts and judgments are evidence only between the same parties, it follows as a consequence, that a conviction in a criminal proceeding is not admissible in a civil action, although both the civil and criminal proceedings may involve an inquiry into, or an investigation of, the same subject matter. This leads us to inquire how far verdicts and judgments rendered in our civil courts are admissible in evidence in a Church trial or investigation. While it can not be contended that the parties in a Church trial and in a civil or criminal proceeding are the same, and that verdicts and judgments are inadmissible for that reason,

covenant broken. There is no necessity for him to involve himself in a lawsuit to defend himself against a title which he is satisfied must ultimately prevail.

But he consents at his own peril. If the title to which he has yielded be not good, he must abide the loss, and in a suit against his warrantor the burden of proof will be on the plaintiff, although it would be otherwise in case of an eviction by force of a judgment at law, with notice of the suit to the warrantor; for in such case, unless it be obtained by fraud, the judgment itself will be plenary evidence. *Hamilton* v. *Cutts*, 4 Mass. 352.

that is, upon the general ground of a want of mutuality in the parties, there is, however, to our minds, a far more satisfactory ground of exclusion to be found in the fact that the modes of investigation and the rules of decision are not the same. In the one case the decision is based upon arbitrary rules of law enacted by the government without regard to the question of guilt or innocence, right or wrong, ethically considered; in the other, natural right and moral wrong are aimed at and nicer shades of distinction are drawn. But questions will frequently arise in Church trials or investigations not as to the guilt or innocence of the accused alone, but as to the existence of certain records or proceedings in our civil courts. In such cases the record constituting a material part of the inquiry is properly receivable in evidence for the purpose of proving its own existence. Thus, a record is admissible and conclusive evidence of the fact in a Church trial against the accessory that the principal felon has been convicted; but the accessory may deny that the principal committed the crime, and he may also controvert the allegation of his being accessory to its commission, for in relation to these points the record, when it is admissible at all, is only *prima facie* evidence.[1]

This leads us to notice a distinction that is not very clearly pointed out by our elementary writers on the law of evidence, but which, when properly understood, enables us to reconcile many of the seeming anomalies in this branch of the law of evidence. A verdict or judgment is offered in evidence either to establish the mere fact of its own rendition and those legal consequences which result from the fact, or it is offered with a view to collateral purposes; that is, to prove not only the fact that such a judgment or verdict has been rendered and so let in all the necessary legal consequences, and thus become the medium of proving some fact as found by the verdict upon whose supposed existence the judgment is based. For the first of these purposes, that is, for establishing the fact that such a judgment was pronounced and all the legal consequences of such a judgment, the judgment itself is invariably not only admissible as the proper legal evidence, but usually conclusive evidence to prove

[1] *The State* v. *Chittem*, 2 Dev. R. 49; *The State* v. *Sims*, 2 Bailey, 29.

that fact; for it will be presumed that the court or other tribunal has made a faithful record of its own proceedings; and, in the next place, the mere fact that such a judgment was given can never be considered as *res inter alios acta*, being a thing done by public authority; neither can the legal consequences of such a judgment be ever so considered, for where the law gives to a judgment a particular operation, that operation is properly shown and demonstrated by means of the judgment, which is no more *res inter alios* than the law that gives it force; but with reference to any fact, upon the supposed existence of which the judgment is founded, the proceedings may or may not be *res inter alios*, according to the circumstances. For illustration: if a party be prosecuted and convicted of assaulting and beating another, the record of the judgment would be incontrovertible evidence of the fact that such party had been so convicted, and, in like manner, would be conclusive as to all the legal consequences of such a conviction. And as one of the legal consequences resulting from a conviction is that the offender shall not be punished a second time for the same offense, consequently the record would be conclusive to protect him from a second prosecution for the same crime; so if a party has been acquitted and has brought an action against another party for a malicious prosecution, it would become necessary to prove the fact of acquittal, and for this purpose the record is conclusive evidence. But suppose the party convicted was sued in an action of trespass to recover damages for the assault of which he was convicted, and offered to prove the assault by the record of conviction, he would then be offering a judgment, not with a view of proving the mere fact of conviction, or to establish legal consequences to be derived from it, but for the collateral purpose of proving the fact upon the supposed existence of which the judgment was found. With respect to such fact, that is, the facts upon which a judgment professed to be founded, it may or may not be evidence, according to the circumstances, considering the nature of the facts themselves and the parties.[1]

A record between different parties is frequently admissible in evidence by way of inducement to the action or prosecution; for

[1] 2 Starkie's Ev. 182–184; *Stephens* v. *Jack*, 3 Yerk. Rep. 403.

illustration, upon an indictment for purjury, the record of the trial upon which the perjury was alleged to have been committed must be produced in order to show that such trial took place. Also in an action against a sheriff for negligence in the service of an execution, the creditor's judgment is, of course, admissible.[1] So a verdict and judgment in a former cause is frequently admissible, where it is between different parties, for the purpose of laying the foundation for the introduction of evidence, showing that a witness testified differently there to what he now does, or to prove that he testified alike on both trials after his credit had been assailed.[2] A judgment rendered by a person or a court having competent authority is admissible to protect him against actions for any thing judicially done within the scope of that authority, and in such a case the judgment is not received to prove the truth of the fact upon which it is founded, for with a view to the defense, the truth of those facts is not material; but in order to prove the fact of a judgment pronounced by competent authority so as to establish the immunity of the judge which is a legal consequence of the judgment, such judgment becomes, without reference to the parties, an essential link in the defense. So where the sheriff is sued for trespassing and he is justified under an execution, the judgment upon which the execution issued, although between third parties, is admissible.[3]

The same doctrine obtains in regard to a judgment or decree which is of the muniments of a party's estate; as where it is necessary to establish the validity of a deed made under the authority of a decree in Chancery, there the decree may be given in evidence by or against a stranger. The judgment in such a case comes in as a fact, or, in other words, as a link in the chain of title, upon the same ground that the conveyance would[4]

[1] *Adams* v. *Boggs*, 5 Greenl. 188.

[2] *Foster* v. *Shaw*, 7 Serg. & Rawle, 156; *Moore* v. *Smith*, 14 Serg. & Rawle, 388.

[3] 2 Starkie's Ev. 188, 189.

[4] A decree in Chancery, under which title to land has been made, is admissible in evidence as one of the links in the chain of title, though *inter alios* Justice Story delivers the opinion of the Court, and on this point the Court say: "Another error alleged is, that the Court allowed the decree of the Circuit Court in the Chancery suit between Michael Gratz and John Craig and others to be given in evidence to the jury. In our opinion this record was clearly admissible.

to prove the link in the chain of title. A decree of a court of chancery is admissible in evidence, when relevant to the issue in an action at law under the same limitations, and subject to the same rules as verdicts or judgments, that the decree of a court of Chancery determining the amount due from one party to another will be enforced in a court of law. It was formerly held that an action at law was not maintainable upon the decree of a court of equity for a specific performance, the decree merely ascertaining that a party is under equitable obligations to pay money.[1] But it is now well settled that the effect of a decree in Chancery

It is true that in general judgments and decrees are evidence only in suits between parties and privies. But the doctrine is wholly inapplicable to a case like the present, where the decree is not introduced as *per se* binding upon any rights of the other party but as an introductory fact to a link in the chain of the plaintiff's title and constituting a part of the muniments of his estate; without establishing the decree, it would be impossible to establish the legal validity of the deed from Robert Johnson to the lessors of the plaintiffs, which was made under the authority of that decree; and, under such circumstances, to reject the proof of the decree would be, in effect, to declare that no title derived under a decree in Chancery was of any validity, except in a suit between parties and privies, so that in a suit by or against a stranger it would be a mere nullity. It might, with as much propriety, be argued that the plaintiff was not at liberty to prove any other title-deeds in this suit because they were *res inter alios acta*. *Barr* v. *Gratz's Heirs*, 4 Curtis, 379.

Hollinsworth v. *Barbour*, 9 Curtis, 156. In this case Baldwin, J., delivers the opinion of the Court and, among other things, says: "It is an acknowledged general principle that judgments and decrees are binding only upon parties and privies. The reason of the rule is founded in the immutable principle of natural justice that no man's rights should be prejudiced by the judgment or decree of a court without an opportunity of defending the right. This opportunity is offered, or supposed in law to be offered, by a citation or notice to appear actually served; or, constructively, by pursuing such means as the law may, in special cases, regard as equivalent to personal service. The course of proceedings in admiralty causes and some other cases where the proceedings are strictly *in rem*, may be supposed to be exceptions to this rule. They are not properly exceptions. The law regards the seizure of the thing as constructive notice to the whole world; and all persons concerned in interest are considered as affected by this constructive notice. But if these cases do form an exception, the exception is confined to the class of cases already noticed, where the proceeding is strictly and properly *in rem*, and in which the thing condemned is first seized and taken into the custody of the court." Yet there is no doubt that a decree can be introduced in evidence whether the suit is between the same parties or not (and this, of course, is no exception to the general rule with reference to parties and privies).

[1] *Carpenter* v. *Thornton*, 3 B. & A. 52; *Davies* v. *Lowndes*, 1 Bing. 607.

is to convert that which was a mere equitable obligation into a legal demand, and as such is capable of being enforced in an action at common law.

Decrees in Chancery between third parties concerning land have been held to be evidence for the purpose of showing the character in which the possessor was in possession, enjoying the lands, on a trial touching or involving the right to the same lands; and with respect to the objection that the decree was *res inter alios acta*, it was observed that this reason was not conclusive against their admissibility.

A question has sometimes arisen as to whether a bill in Chancery, which is a narration of facts spread upon the record by a complainant, may be received in evidence when offered by the other side against the complainant on the principle of its being an admission made by him. The authorities on this question are not uniform; but the weight of authority as well as reason is against the admissibility of a bill in Chancery for this purpose; as the facts stated are almost invariably the mere suggestions of counsel, made for the purpose of obtaining an answer upon oath by the defendant. But a bill in Chancery is often admissible in evidence to show the existence of a judicial proceeding, and also that certain facts were in issue between the parties, in order to lay the foundation for the admission in evidence of the answer, depositions, or decree.

We have in this country no ecclesiastical courts such as are established by acts of Parliament and general custom in England. We have elsewhere shown that our ecclesiastical tribunals are not recognized as possessing any judicial authority, except as such recognition grows out of the relation that the Church sustains to the civil government. Yet even here the sentences of ecclesiastical courts, though they are not courts of record and have no authority except what is conferred by voluntary association, their findings and determinations, within the scope of their jurisdictions, are conclusive between the Church and its members, for the purpose and objects for which they are had; and where those purposes and objects become the subject of inquiry or investigation in a subsequent proceeding between the same parties in a Church trial or investigation, or in our civil courts, such decisions are admissible to prove matters which are

expressly adjudicated; but not for the purpose of establishing facts which are only matters of inference from the decision. Thus, where a legal character is conferred on a person by the ecclesiastical courts, such as marriage, Church membership, etc., such legal character so conferred binds the temporal courts the same as the decree of a court of equity is binding upon a court of law.[1] It is said by the court in the case of the Duchess of

[1] In this unhappy controversy is involved a graver question and of deeper moment to all Christian men, indeed to all men who believe that Christianity pure and simple is the fairest system of morals, the firmest prop to our government, the chiefest reliance in this life and the life to come. Shall we maintain the boundary between the Church and State, and let each revolve in its respective sphere, the one undisturbed by the other? All history warns us not to arouse the passion or wake up the fanaticism which may grapple with the State in a deathly struggle for supremacy.

Our Constitution provides that "the free exercise and enjoyment of religious profession and worship without discrimination shall forever be guaranteed." In ecclesiastical law, profession means the act of entering into a religious order. Religious worship consists in the performance of all the external acts, and the observance of all ordinances and ceremonies which are engaged in for the sole and avowed object of honoring God. The Constitution intended to guarantee from all interference by the State not only each man's religious faith, but his membership in the Church, and the rites and discipline which might be adopted. The only exception to uncontrolled liberty is, that acts of licentiousness shall not be excused, and practices inconsistent with the peace and safety of the State shall not be justified. Freedom of religious profession and worship can not be maintained if the civil courts trench upon the domain of the Church, construe its canons and rules, dictate its discipline, and regulate its trials. The larger portion of the Christian world has always recognized the truth of the declaration, "A Church without discipline must become, if not so already, a Church without religion." It is as much a delusion to confer religious liberty without the right to make and enforce rules and canons, as to create government without power to punish offenders. The Constitution guarantees the "free exercise and enjoyment." This implies not alone the practice but the "possession with satisfaction" not alone the exercise, but the exercise coupled with enjoyment. This "free exercise and enjoyment" must be, as each man, and each voluntary association of men, may determine. The civil power may contribute to the protection but can not interfere to destroy or fritter away.

The civil courts will interfere with Churches or religious associations when rights of property or civil rights are involved. But they will not revise the decisions of such associations upon ecclesiastical matters merely to ascertain their jurisdiction. As we understand the position of the defendant in error, his civil rights are not so endangered as to require our interposition. It may not be improper to collate some of the authorities which bear upon this question. The

Kingston, that "although a sentence of nullity of marriage, or in affirmance of marriage, or in suits upon a promise of marriage, or for jactitation of marriage in the ecclesiastical courts of

controlling principle is declared in the 24th statute of Henry VIII, "Causes spiritual must be judged by judges of the spirituality, and causes temporal by temporal judges." In *Baptist Church* v. *Withenell*, 3 Paige, 296, the Chancellor said: "Over the Church as such, the legal tribunals do not profess to have any jurisdiction whatever, except to protect the civil rights of others, and preserve the public peace. All questions relating to the faith and practice of the Church and its members belong to the Church judicatories, to which they have voluntarily subjected themselves." In *Sawyer* v. *Cipperly*, 7 Paige, 281, it is said, "the Church as to its doctrines, government, and worship, is to be governed by its peculiar rules." In the case of *Gable* v. *Miller*, 10 Paige, 627, the learned Chancellor doubted the soundness of his former decision, but his decree was reversed by the highest court in the State by a vote of fourteen to three. *Miller* v. *Gable*, 2 Denio, 492. The same principle was enunciated in *Robertson* v. *Bullions*, 9 Barb. 64, and *Diefendorf* v. *Ref. Col. Church*, 20 John. 12.

In the case of the *German Reformed Church* v. *Seibert*, 3 Barr. 291, it is said: "The decisions of ecclesiastical courts are final, as they are the best judges of what constitutes an offense against the Word of God and the discipline of the Church." The Court of Appeals of Kentucky, in *Shannon* v. *Frost*, 3 Ben. Monroe, 258, says: "This Court having no ecclesiastical jurisdiction, can not revise ordinary acts of Church discipline or excision." In a recent case of *Forbes* v. *Eden* (Cases in House of Lords, 3 Series, Vol. 5, 36), decided in 1867, the Rev. Mr. Forbes alleged that he could not conscientiously obey certain canons, and that, as a consequence, he might be degraded from his office of minister and be deprived of temporal advantages, the Lord Chancellor said: "Appellant does not allege that any actual damage has been suffered, but founds his action upon a possibility of damage hereafter," and that "it was a mere abstract question, involving religious dogmas and resulting in no civil consequences which would justify the interposition of a civil court." Lord Cranworth said: "There is no authority in the courts to take cognizance of the rules of voluntary societies, save only so far as it may be necessary for the due disposal and administration of property." Lord Colony said: "A court of law will not interfere with the rules of a voluntary association unless it is necessary to protect some civil right."

Christianity was never considered a part of the common law so far as that for a violation of its injunctions, independent of the established laws of man, and without the sanction of any positive act made to inforce those injunctions, any man could be drawn to answer in a common law court. It was a part of the common law, so far that any person reviling, subverting, or ridiculing it, might be prosecuted, because such conduct struck at the foundation of our civil society, and tended, by its necessary consequences, to disturb the peace of the land, of which the common law was the preserver. *State* v. *Chandler*, 2 Harr. 555.

England had been received in civil causes, yet the parties to the cause, or at least the parties against whom the evidence was received, were parties to the sentence and had acquiesced in it, or claimed under those who were parties or had acquiesced. But these observations seem to have reference to causes where the proceedings in the ecclesiastical court were not proceedings *in rem*, and where the question of marriage was only incidentally determined, but where the purpose of the suit is to directly deprive a person of the character of husband or wife by sentence of nullity of marriage. It appears to have the effect of establishing conclusively the legal status of the parties for and against all persons. But it was held that a sentence of excommunication pronounced by an ecclesiastical tribunal for incontinency was inadmissible on an issue in a Court of Chancery to try a question of legitimacy, upon the ground that it was *res inter alios acta;* but if it had been a sentence on the point of marriage in a

"While we decide nothing that will affect the ecclesiastical rights of the Church, which we are not competent to do, its civil rights of property are subjects for our examination, to be determined in conformity to the laws of the land and the principles of equity." *Ferraria* v. *Vasconcellos*, 31 Ills. 25. There are some authorities in favor of interference, but the cases collated declare the law as we think it ought to be. We have been referred to numerous cases in Massachusetts. The Constitution of that State, from 1780 to 1833, makes it the duty of the Legislature "to require the several towns, parishes, precincts, and other bodies politic, or religious societies, to make suitable provision, at their own expense, for the institution of the public worship of God, and for the support and maintenance of public Protestant teachers of piety, religion, and morality in all cases where such provision shall not be made voluntarily." Const. Mass. Part 1, Art. 3. Laws were passed for the purpose contemplated, and an ecclesiastical law has thus grown up there. These decisions are not applicable in this State, as legislative and judicial interference in such matters is expressly forbidden by the Constitution, which all are bound to obey. This case may then be briefly summed up: A rector in the Church is charged with nonconformity to its doctrines, intentional omissions in the ministration of its ordinances, and the attempt is made to organize a court composed of his brother clergymen for a trial. He appeals to the civil court, and alleges, as the chief reason for interposition, the want of authority in the spiritual court to try him, and a misconstruction of the canons. The same point was made to that court and its power denied. It was urged with the same earnestness and enforced with the same arguments there as here. That court overruled the objection and decided that it had jurisdiction. Five intelligent clergymen of the Church, presumed to be deeply versed in Biblical and canonical lore, were more competent than this Court to decide the

question on the legality of the marriage, it might have been admissible.[1]

It is a general rule of law, applicable as well to a Church trial as to other proceedings, that when any matter belongs to the jurisdiction of one tribunal so peculiarly that other courts can only take cognizance of the same subject incidentally and indirectly, the latter are bound by the sentence of the former, and must give credit to such sentences.[2]

Thus, in trespass *quare clausum fregit* for breaking the plaintiff's close, the determination of the Court of Sessions locating the line of two towns was held conclusive between the parties, and fixed the town and county in which the *locus in quo* should be adjudged to be, independent of the powers of the surrogate, judge of probate, orphans' court, ordinary, or of whatever name, coming in the place of the English ecclesiastical courts, created and regulated by statute. Such courts in this country would not, by the general adoption of the common law,

peculiar questions raised. Why should we review that and not every other decision which involves the interpretation of the other canons? It is conceded that when jurisdiction attaches the judgment of the Church court is conclusive as to purely ecclesiastical offenses. It should be equally conclusive upon doubtful and technical questions involving a criticism of the canons, even though they might comprise jurisdictional facts. It requires no more intellect, information, or honesty to decide what is an ecclesiastical offense than to determine the authority of the court according to the canons; the distinction is without a difference.

Civil courts have duties and responsibilities devolved upon them and a well defined jurisdiction to maintain. The Church has more solemn duties, more weighty responsibilities, and an authority granted by the infinite Author of all things. We shall not enter in and "light up her temple from unhallowed fires." The ministers selected to sit in judgment on the acts of a brother ought to be impartial and competent, prompted, as they doubtless are, by the teachings of divine revelation and the kindly influence of Christian charity, which "suffereth long and is kind, beareth all things, believeth all things, hopeth all things, endureth all things."

Having given this case a most careful consideration, our deliberate judgment is, that the ecclesiastical court ought not to be restrained by the mandate of this Court. *Chase et al.* v. *Cheney*, 58 Ills. 536.

Dutch Church of Albany v. *Bradford*, 8 Cowen, 457.

[1] *Hillyard* v. *Grantham*, 2 Ves. 246.

[2] *Hall* v. *Warren*, 9 Ves. 605; *Ex parte* Barnsley, 3 Atk. 168; Bac. Abr. Idiots, etc.; *B. M'Donald* v. *Morton*, 1 Mass. R. 546; *White* v. *Palmer*, 4 Mass. R. 147; *Stone* v. *Damon*, 12 Mass. R. 488; 1 Stark. Evid. 258, 259.

be possessed of all the power exercised by the English ecclesiastical courts, for want of a hierarchy furnishing the appropriate officers and machinery for the action of an ecclesiastical forum if for no other reason. Their powers are, however, limited and defined by law, for they are the creatures of the statutes creating them; but their powers are defined in the same way, and hence they are treated as special, limited, and inferior jurisdictions; and a concurrence of circumstances must be set forth and established indicating that they have acted within the scope of their specific powers. Thus, in setting forth a surrogate's decree for distribution, you must plead that the same surrogate granted the letters of administration, for such surrogate could alone make the decree.[1] In proving a surrogate's or other probate's sale

[1] *Curia*, per Savage, Chief-Justice: The defendant makes five objections to the sufficiency of the declaration: First, it is said the execution should have been issued against Bristol and wife; and secondly, that interest is not recoverable. If these objections were well founded the sheriff would not, therefore, be at liberty to suffer an escape; nor would he if the third point be tenable. The declaration must describe correctly the record and proceedings it purports to set out; and if the record or proceedings produced on trial do not correspond with the description, the objection may be taken for the variance.

But it is objected, fourthly, that the declaration does not give jurisdiction to the surrogate, and, it seems to me that this objection is unanswerable. The construction given to the act (1 R. L. 448, §§ 11, 12) by the late Chancellor Kent is, that the surrogate granting administration has power to call the administrator to account. I think jurisdiction belongs to the surrogate's court alone which granted the administration. It is not averred in this declaration either that the surrogate of Columbia County granted administration or that he had jurisdiction of the matter.

The rule is, that the pleading, relying on a proceeding of an inferior jurisdiction, must set forth the facts necessary to give jurisdiction; and it may then say, *taliter processum fuit*, etc. Such summary proceedings are contrary to the course of the common law. The surrogate's court is entirely a creature of the statute. It should be shown to the Court affirmatively, therefore, that the surrogate had power to make the decree; that the facts upon which he acted gave him jurisdiction of the subject matter and of the persons before him. There is nothing in the last objection that the counts of the declaration are repugnant. *Dakin* v. *Hudson*, 6 Cowen, 224.

The object of this bill is not simply discovery but relief. It seeks to transfer to this Court the jurisdiction of the whole matter of account between the administrators and next of kin; and that, too, after the cognizance of the case has duly attached before the surrogate. It is not to be disputed that the surrogate is clothed with powers competent to settle the accounts of the estate, and to decree and enforce distribution; and there is no reason assigned why his juris-

of real estate, you must show a petition and an account.[1] So the sentence of a court of probate, ordering the execution of a will, is *prima facie* evidence that it was duly proved, and the grant of

diction should be superseded, and the entire cognizance of the case transferred to this Court. The act relative to the court of probates, etc. (1 N. R. L. 448 §§ 11, 12, 13), declares "that it shall be lawful for the surrogate granting administration to call such administrators to account, etc., and upon hearing, and due consideration, to order distribution, etc., and the same distribution to decree and settle, and compel such administrators to observe and pay the same, and to enforce such decree by imprisonment, etc., and to compel witnesses to attend and be sworn, etc. The surrogate has so far a concurrent jurisdiction with this Court; and without some special reason set forth in the bill, I am not inclined to interfere with the ordinary exercise of such a power; because I do not at present perceive that such an interference would be warranted. There is nothing in this case that would not apply to every case, and it would be assuming exclusive jurisdiction over the subject matter.

But if this be considered as a mere bill of discovery, in aid of the cause before the surrogate, it is essentially defective. There is not sufficient ground laid for staying a trial at law, or a proceeding in another court. The bill ought to have charged that certain facts were within the knowledge of the defendants, and that a disclosure from them was requisite. The bill or affidavit to support the injunction must state the belief of the plaintiff that the answer would furnish discovery material to the defense, and that the plaintiff had not the means of obtaining the facts without such discovery. This was the doctrine of the case of *Gelston* v. *Hoyt*, 1 John. Ch. Rep. 543, and it is supported by other decisions. *Appleyard* v. *Seton*, 16 Ves. 223; *Duvals* v. *Ross*, 2 Munf. 290. A general demurrer will lie to a bill that seeks immaterial discovery (8 Bro. P. C. 161), and it is not material unless it really be wanted for the defense at law. In this case the plaintiff is only apprehensive that he should not be able to make full proof of the material facts. This is too feeble an averment, a suggestion of too doubtful an import, and of too diffident a pretension to justify an injunction, staying a proceeding before a competent tribunal. Probably, if the question on the materiality of the discovery sought had arisen on a demurrer to the bill, and an injunction staying the suit at law in the mean time had not been asked for, the materiality of the discovery might not have been very nicely examined. Lord Thurlow said, in such a case, upon demurrer (*Bishop of London* v. *Fytche* 1 Bro. C. C. 69), that "whether it was material or not, was chiefly for the plaintiff to judge, for he must pay the cost of the application. It would remain with another court to say how far it was material. Motion denied. *Seymore* v. *Seymore et al.* 4 John Ch. 410.

[1] By the Court, Marcy, J. "However extraordinary or erroneous be the determination and proceedings of a court of limited authority, if it acts within its proper jurisdiction as to the subject matter, place, and person, its judgment or decree can not be impeached or invalidated in a collateral action. This case presents the question, What is necessary to give the surrogate jurisdiction where real estate is directed to be sold to supply a deficiency in the assets to pay the

letters of administration by a probate court is *prima facie* evidence of the death of the testator, or intestate, and can not be collaterally assailed; neither can an order admitting a will to

debts of a testator or intestate? The argument on behalf of the defendant seemed to proceed on the assumption that an actual deficiency in the assets must exist in order to confer jurisdiction. By an examination of the act relative to the Court of Probate (1 R. L. 450, § 23), it will be found that the surrogate, if he be the officer for the county in which probate of the will or letters of administration were granted, is required to act on the suggestion of an administrator or executor of a deficiency of assets, and on receiving an account of the personal estate and debts of the deceased. He thus acquires jurisdiction of the subject matter. Notice is then required to be given for persons interested to show cause against granting the order for the sale of the real estate. After hearing the proofs and allegations of the executors or administrators and other persons interested in the estate, the surrogate is to examine into and determine the question whether there is personal property sufficient to pay the debts or not; and if he finds there is not enough for that purpose he orders a sale. In deciding upon the sufficiency of the assets he acts judicially, and an error in this matter does not affect his jurisdiction. It would no more invalidate his subsequent proceedings than a mistake as to any other matter submitted to his examination and decision. He has not only authority, but it is his duty to settle that question. If he errs his determination may be reviewed and reversed on an appeal; his proceedings are not void, but voidable only. 3 Cowen, 206. It was not made a question but that the surrogate of Jefferson County was the proper officer to entertain the application and to make the order for the sale in case a sale was proper; but it was contended that all the administrators should have joined in the application. When there are several executors, the acts of any one are deemed in law the acts of all. 2 Ves. sen. 267; Toller, 324. A distinction in this respect between executors and administrators is found in some of the books. Comyns does not notice it, and I believe if it ever was established it is now exploded. It was denied in the case of *Jacomb* v. *Harwood*, 2 Ves. sen. 235, and this Court has passed on that question and said that executors and administrators stand on the same ground and their powers and responsibilities in respect to each other are the same. *Douglass* v. *Satterlee*, 11 Johns. Rep. 16; *Murray* v. *Blatchford*, 1 Wendell, 583. If these cases were not sufficient to authorize us to disregard the supposed difference, it would, I apprehend, be very difficult to sustain it by any thing like substantial reasons. The nature of their offices, certainly so far as the personal estate is concerned, is so much alike that it affords no occasion to apply to the one, in deciding upon their acts, a rule which is inapplicable to the other.

The phraseology of the section directing the proceeding when the real estate is to be sold would justify an application by one administrator if the general rule was, that where there were several they must act conjointly. It is that "when any administrator or executor, etc., shall discover or suspect" a deficiency in the personal estate of his testator or intestate to pay the debts, etc., he may make the application in the manner therein provided. Upon general principles,

probate be collaterally resisted by showing that the will is a forgery and that the testator made another testament and appointed another executor. The error in such a case can only be corrected by an appeal from the order admitting the will to probate, or other direct proceeding.[1]

It would seem, that between the parties to an ecclesiastical suit or trial, any point expressly determined would be admissible in evidence in a civil suit in our temporal courts, notwithstanding the sentence did not confer or take away any legal character, and notwithstanding it was not a sentence upon the main objects of the suit, but upon some subordinate matter raised in the pleadings or upon the trial. Cases of this nature have received much consideration in the civil courts; but it has been held, that the sentence of an ecclesiastical court directly upon a point within its peculiar jurisdiction is not, as in civil cases, conclusive on the same matter, coming incidentally into question in a criminal

and by the construction of the statute, I am satisfied that a single administrator, when he has an associate, has the right to call in the aid of the surrogate of the proper county to sell real estate to supply the deficiency in the personal estate to pay the debts of the intestate. Some minor questions are raised in this case upon which we ought to express our views. It is certain that an unreasonable length of time elapsed between the time of granting the letters of administration and the period when the proceedings were instituted for the sale of the real property. This might have been, and, without some explanation should have been, a reason for the surrogate to reject the application. The law fixes no definite limits between which the proceedings must be commenced; we can not, therefore, say that they are void. The time is left to the discretion of the officer, and his error, if any, in relation to it, can be corrected only on appeal. The judge erred, it is said, by receiving an exemplified copy of the letters of administration without evidence or suggestion of the loss of the original. Where the judgment, decree, or proceeding of a court of record is to be proved, it may be done by producing the original or a copy duly authenticated. Starkie's Ev. pt. 2, 151. This is the general rule. I can not find that there is, nor do I know why there should be, an exception to it in relation to the records of surrogates' courts. The letters of administration granted to M'Kee and Doolittle were recorded (perhaps I might say were copies of the record). Lord Ellenborough, in the case of *Alden* v. *Keddell*, 8 East, 187, said that the letters of administration were only a copy of the original minutes of the court. In that case the book of acts directing letters to be issued was received as evidence that letters had been granted. I think the judge decided correctly in receiving the exemplification of the letters of administration in this case. *Jackson* v. *Robinson*, 4 Wendell, 441.

[1] *Moore* v. *Janner's Admins.* Monroe, 42–45.

suit; for proceedings in matters of crime, and especially of felony, fall under a different consideration from civil suits, first, because the parties are not the same, for the people or the State are intrusted with the prosecution of public offenses and the prosecution is carried on in their name; second, ecclesiastical courts can not be admitted to defend, examine witnesses, and exercise the same jurisdiction that is exercised by our criminal courts. Such powers would tend to give the spiritual courts, which are not permitted to exercise any judicial cognizance in matters of crime, an immediate influence in trials for offenses and draw the decision from the course of the common law to which it solely and peculiarly belongs. For it is evident that the ground of the judicial powers recognized as belonging to the Church is merely of a spiritual consideration, and they are therefore addressed to the conscience of the party; but crimes and misdemeanors are wholly and in all their parts of temporal cognizance alone. The temporal courts alone should expound the law and judge of the crime and its proofs, so far as determining the legal guilt or innocence of the accused, and in doing so they must see with their own eyes and try by their own rules—that is, by rules prescribed by law.

Judgments or sentences of ecclesiastical courts, like other judicial proceedings, may be impeached, even when they come up collaterally, by evidence of fraud or collusion, and such evidence is admissible; for it is said, that fraud is an intrinsic collateral act which vitiates the most solemn proceedings; or, in the language of Lord Coke, "It avoids all judicial acts, ecclesiastical and temporal, and that although it was not permitted to show that the ecclesiastical court was mistaken, it might be shown that it was misled.[1] So where a sentence has been pronounced in an ecclesiastical court, and notice has not been given to the party to be affected by the decree or sentence, the sentence will not be enforced, if the jurisdiction, when the matters have not been duly submitted, finds the whole proceeding is treated as a mere nullity, having no binding obligation and entitled to no consideration or respect.[2]

[1] 11 State Trials, 262.

[2] Considering it as settled, then, that the French tribunal had jurisdiction of property seized under a municipal regulation within the territorial jurisdiction

CHAPTER IV.

THE ADMISSIBILITY AND EFFECT OF FOREIGN JUDGMENTS.

It may now be assumed as the settled doctrine, that all sentences of foreign courts of competent jurisdiction as to proceedings *in rem* are to be regarded as they are regarded in the country or under the government where rendered. Thus, a sentence of condemnation, if binding in one country upon the rights of third persons, will be equally binding here, as well on third persons as on the parties to the original suit; and it is conclusive in all questions of prize when offered in evidence in actions upon policies of insurance, and on every subject immediately and properly within the jurisdiction of such foreign court, and upon which they have professed to decide judicially. When such foreign court has proceeded to adjudicate on certain property

of the government of St. Domingo, it only remains for me to say whether it will make any difference if, as now appears to have been the case, the vessel were taken on the high seas or more than two leagues from the coast. If the *res* can be proceeded against when not in possession or control of the court, I am not able to perceive how it is material whether the capture were made within or beyond the jurisdictional limits of France, or in the exercise of a belligerent or municipal right. By a seizure on the high seas she interfered with the jurisdiction of no other nation, the authority there being concurrent. It would seem, also, that if jurisdiction be at all permitted where the thing is elsewhere, the court exercising it must necessarily decide, and that ultimately, or subject only to the review of a superior tribunal of its own State, whether, in the particular case, she had jurisdiction, if any objection be made to it. And although it be now stated as a reason why we should examine whether a jurisdiction was rightfully exercised over *The Sea Flower*, that she was captured more than two leagues at sea, who can say that this very allegation, if it had been essential, may not have been urged before the French court and the fact decided in the negative? And if so, why should not its decision be as conclusive on this as on any other point? The judge must have had a right to dispose of every question which was made on behalf of the owner of the property, whether it related to his own jurisdiction, or arose out of the law of nations, or out of the French decrees, or in any other way; and even if the reasons of his judgment should not appear satisfactory, it would be no reason for a foreign court to review his proceedings or not to consider his sentence as conclusive on the property. *Hudson* v. *Gieestier*, 2 Curtis, 407.

See, also, *Rose* v. *Himely*, *ibid.* 87, where a different opinion is expressed by Marshall, C. J.

upon the ground that such property is an enemy's property, such adjudication is conclusive that the property belongs to enemies, not only for the immediate purpose of such a sentence, but it is binding on all courts and against all persons.[1] But where the sentence or judgment professes to be made on grounds which are particularly set forth in the judgment or sentence, but which appears on the face of the record not to warrant the condemnation, the sentence will not be conclusive as to such facts.[2] Sentences of condemnation, however, pronounced by foreign courts of prize are admissible only where such courts are constituted according to the law of nations and exercise their functions either in a belligerent or in the country of a co-belligerent ally in the war. It has, therefore, been determined that a sentence pronounced by the authority of the capturing power within the dominion of a neutral country to which the prize has been taken is illegal, and consequently would not be admissible evidence to falsify the warrant of neutrality.[3] If the foreign court had no jurisdiction in the case, or if the proceedings were instituted in fraud of the rights of sovereignty, or for the purpose of thwarting justice, such fact may be proved in order to render such sentence inoperative and void.

Some difference of opinion has prevailed in respect to the effect of foreign judgments where the action is founded on such judgment, but it is now clearly established that such judgment is *prima facie* evidence, and the defendant may impeach it where the proceedings are *in personam* by showing that it was irregularly obtained, or, indeed upon almost any ground which would have constituted a defense to the original action.[4] But a different rule

[1] *Kindersley* v. *Chase*, Park, Ins. 8 ed. 743.

[2] *Calver* v. *Evil*, 7 Term R. 533; 8 Term R. 444.

[3] 2 Phillips's Evidence, 53.

[4] The sentence of a foreign Court of Admiralty is only *prima facie* evidence of the facts on which the condemnation purports to have been founded; and in a collateral action such evidence may be rebutted by showing that no such fact did in reality exist. *Francis* v. *Ocean Ins. Co.*, 6 Cowen, 404; S. C. in error, 2 Wendell, 64. The court will not hear an argument to show that such a sentence is conclusive of the facts on which the foreign court proceeded. *N. Y. Fire Ins. Co.* v. *De Wolf*, 2 Cowen, 56.

The question is whether St. Lucar was, at the time of the capture, a blockaded port within the exception in the policy. This is a matter of fact, depend-

prevails under the Constitution and laws of the United States, for full faith and credit are given to the judgments of a State court when in the courts of another State they receive the same faith and credit to which they were entitled in the State where they were pronounced. This rule does not depend upon the doctrine of State comity between States, but upon the force and

ing on a contract between our own citizens. It has nothing to do with any conflict between belligerent and neutral pretensions. It does not necessarily involve any examination into the just extent of these pretensions. It is a plain inquiry into the existence of a fact, namely, was here a loss chargeable to the existence of a blockade? A blockade may exist in fact, and yet a capture and condemnation for the breach of it be unjust from the want of knowledge in the neutral of the existence of the blockade. This case, then, need not, and ought not to, awaken any prejudice or bias one way or the other as respects the object of the present suit, and there are no considerations which ought to have induced a jury to require more strict evidence of this than of any other ordinary question of fact. The evidence of a blockade of St. Lucar existing *de facto* at the time of the capture consisted of the following items, namely: The sentence of condemnation which proceeded directly on the ground of that fact, and this sentence is *prima facie*, though not conclusive, evidence of the fact of the blockade. This effect of the foreign sentence was conceded by the counsel and the court upon the final decision in the Court of Errors of the greatly litigated question touching the conclusiveness of foreign sentences. 2 Johns. Cas. 451; *Radcliff* v. *United Ins. Co.*, 9 John. 281, 282.

The sentence of condemnation by the Court of Vice-Admiralty contains the express allegation that St. Lucar was blockaded, not nominally, but *de facto*, and the vessel and cargo were condemned for an attempt to violate it. This sentence will be acknowledged to be presumptive or *prima facie* evidence of the fact, and it stands as good proof until that presumption be destroyed. The testimony delivered at the trial appears to me to confirm it. The letter of Mr. Canning to Mr. Pinkney, of the 8th of January, 1808, would have still further corroborated the proof of the blockade, as it was decisive evidence of the intention of the English Government to include St. Lucar in the blockade of Cadiz, and to carry the blockade at the entrance of those ports into the most vigorous effect. This letter I think ought to have been admitted in evidence. It appears to have been printed at the city of Washington by persons who the defendants offered to show were printers to Congress, and to have composed a part of a set of public documents transmitted to Congress by the President of the United States. A greater strictness of proof in respect to such public matters of State, and when they are introduced collaterally and not as matters of fact in issue, would be inconvenient, and is not now, in practice, required. Thus, in the case of *The King* v. *Holt*, 5 Term Rep. 436, the K. B. held, that the London *Gazette* was *prima facie* evidence of matters of State; and in *Talbot* v. *Seaman*, 1 Cranch, 38, a French decree was allowed by the Supreme Court of the United States to be read upon no higher proof than that which attended the letter in question. *Radcliff* v. *United Ins. Co.*, 7 John. 50.

effect of the Constitution and laws of the United States. It differs from the rules of comity which may be restraints upon a court in the exercise of an authority which it actually possesses in that it is mandatory upon the States, whereas State comity is self imposed.[1]

[1] And this brings us to the question which has been so elaborately discussed, whether by the comity of nations and between these States the corporations of one State are permitted to make contracts in another. It is needless to enumerate here the instances in which, by the general practice of civilized countries, the laws of the one will, by the comity of nations, be recognized and executed in another where the right of individuals is concerned. The cases of contracts made in a foreign country are familiar examples, and courts of justice have always expounded and executed them according to the laws of the place in which they were made, provided that law was not repugnant to the laws or policy of their own country. The comity thus extended to other nations is no impeachment of sovereignty; it is the voluntary act of the nation by which it is offered, and is inadmissible when contrary to its policy or prejudicial to its interests. But it contributes so largely to promote justice between individuals and to produce a friendly intercourse between sovereignties to which they belong, that courts of justice have continually acted upon it as a part of the voluntary law of nations. It is truly said in Story's Conflict of Laws, 36, 37, that "In the silence of any positive rule affirming or denying or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their own government, unless they are repugnant to its policy or prejudicial to its interests. It is not the comity of the courts, but the comity of the nation, which is administered and ascertained in the same way and guided by the same reasoning by which all other principles of municipal law are ascertained and guided."

Adopting, as we do, the principle here stated, we proceed to inquire whether, by the comity of nations, foreign corporations are permitted to make contracts within their jurisdiction, and we can perceive no sufficient reason for excluding them when they are not contrary to the known policy of the State or injurious to its interests. It is nothing more than the admission of the existence of an artificial person created by the law of another State and clothed with the power of making certain contracts. It is but the usual comity of recognizing the law of another State. In England, from which we have received our general principles of jurisprudence, no doubt appears to have been entertained of the right of a foreign corporation to sue in its courts since the case of *Henriques* v. *The Dutch West India Company*, decided in 1729. 2 L. Raymond, 15, 32. And it is a matter of history which this court is bound to notice, that corporations created in this country have been in the open practice, for many years past, of making contracts in England of various kinds and to very large amounts, and we have never seen a doubt suggested there of the validity of these contracts by any court or any jurist. It is impossible to imagine that any court in the United States would refuse to execute a contract by which an American corporation had borrowed money in England; yet if the contracts of corporations made

Much controversy has existed as to whether foreign sentences affecting the general capacity or status of persons, or sentences concerning marriage or divorce, when adjudicated upon by a

out of the State by which they were created are void, even contracts of that description could not be enforced.

It has, however, been supposed that the rules of comity between foreign nations do not apply to the States of this Union; that they extend to one another no other rights than those which are given by the Constitution of the United States; and that the courts of the general government are not at liberty to presume, in the absence of all legislation on the subject, that a State has adopted the comity of nations towards the other States, as a part of its jurisprudence; or that it acknowledges any rights but those that are secured by the Constitution of the United States. The Court think otherwise. The intimate union of these States, as members of the same great political family, the deep and vital interests which bind them so closely together, should lead us, in the absence of proof to the contrary, to presume a greater degree of comity and friendship and kindness towards one another than we should be authorized to presume between foreign nations. And when (as without doubt must occasionally happen), the interest or policy of any State requires it to restrict the rule, it has but to declare its will, and the legal presumption is at once at an end. But until this is done, upon what grounds could this Court refuse to administer the law of international comity between these States? They are sovereign States, and the history of the past, and the events which are daily occurring, furnish the strongest evidence that they have adopted towards each other the laws of comity in their fullest extent. Money is frequently borrowed in one State, by a corporation created in another. The numerous banks established by different States are in the constant habit of contracting and dealing with one another. Agencies for corporations engaged in the business of insurance and of banking have been established in other States, and suffered to make contracts without any objection on the part of the State authorities. These usages of commerce and trade have been so general and public, and have been practiced for so long a period of time, and are so generally acquiesced in by the States, that the Court can not overlook them when a question like the one before us is under consideration. The silence of the State authorities, while these events are passing before them, show their assent to the ordinary laws of comity which permit a corporation to make contracts in another State. But we are not left to infer it from general usages of trade, and the silent acquiescence of the States. It appears from the cases cited in the argument, which it is unnecessary to recapitulate in this opinion, that it has been decided in many of the State courts, we believe in all of them where the question has arisen, that a corporation of one State may sue in the courts of another. If it may sue, why not make a contract? The right to sue is one of the powers which it derives from its charter. If the courts of another country take notice of its existence as a corporation, so far as to allow it to maintain a suit, and permit it to exercise that power, why should not its existence be recognized for other purposes, and the corporation permitted to exercise another power which is given to it by the same law and the same sover-

foreign tribunal ought to be conclusive. In regard to marriages the general principle is, that between persons *sui juris* marriage is to be decided by the law of the place where it is celebrated.

eignty, where the last mentioned power does not come in conflict with the interest or policy of the State? There is certainly nothing in the nature and character of a corporation which could justly lead to such a distinction, and which should extend to it the comity of suit and refuse to it the comity of contract. If it is allowed to sue, it would, of course, be permitted to compromise, if it thought proper, with its debtor, to give him time to accept something else in satisfaction, to give him a release, and to employ an attorney for itself to conduct its suit. These are all matters of contract, and yet are so intimately connected with the right to sue that the latter could not be effectually exercised if the former were denied. We turn in the next place to the legislation of the States. So far as any of them have acted on this subject, it is evident they have regarded the comity of contract, as well as the comity of suit, to be a part of the law of the State unless restricted by statute. Thus, a law was passed by the State of Pennsylvania, March 10, 1810, which prohibited foreigners and foreign corporations from making contracts of insurance against fire, and other losses mentioned in the law. In New York, also, a law was passed March 18, 1814, which prohibited foreigners and foreign corporations from making in that State insurance against fire, and by another law passed April 21, 1818, corporations chartered by other States are prohibited from keeping any office of deposit for the purpose of discounting promissory notes or carrying on any kind of business which incorporated banks are authorized by law to carry on. The prohibition of certain specific contracts by corporations in these laws is by necessary implication an admission that other contracts may be made by foreign corporations in Pennsylvania and New York, and that no legislative permission is necessary to give them validity. And the language of these prohibitory acts most clearly indicates that the contracts forbidden by them might lawfully have been made before these laws were passed.

Maryland has gone still further in recognizing this right. By a law passed in 1834, that State has prescribed the manner in which corporations not chartered by the State, "which shall transact or shall have transacted business" in the State, may be sued in its courts upon contracts made in the State. The law assumes in the clearest manner that such contracts were valid, and provides a remedy by which to enforce them.

In the legislation of Congress also, where the States and the people of the several States are all represented, we shall find proof of the general understanding in the United States that by the law of comity among the States, the corporations chartered by one were allowed to make contracts in the others. By the Act of Congress of June 23, 1836, 4 Story's Laws, 2445, regulating the deposits of public money, the secretary of the treasury was authorized to make arrangements with some bank or banks to establish an agency in the States and territories where there were no banks, or none that could be employed as a public depository, to receive and disburse the public money which might be directed to be there deposited. Now if the proposition be true that a corporation created

It has a legal ubiquity of obligation. If valid where celebrated, it is valid every-where. To this rule, however, there is an acknowledged exception, arising out of marriages involving incest and polygamy, which are prohibited by the law of the land from motives of public policy. Such marriages when celebrated abroad or in foreign countries do not receive the sanction of our municipal laws or the courts of the land, but they are regarded with great disfavor. The sentence of a foreign court directly establishing a marriage in that country would be conclusive in any of our courts here on the validity of the marriage. And it seems that a decree of divorce granted in the country where the marriage was solemnized would at least carry with it great authority in this country.[1] Some of the most embarrassing questions belonging to international jurisprudence "arise," says Mr. Justice Story, "under the head of marriage and divorce. Suppose, for instance, a marriage celebrated in England, where marriage is indissoluble, and a divorce obtained in Scotland *a vinculo matrimonii* as may be for adultery under its laws, will that divorce be operative in England so as to authorize a new marriage here by either party? Suppose a marriage in Massachusetts, where a divorce may be had for adultery, will a divorce obtained in another State for a cause unknown to the laws of Massachusetts be held valid there? If in each of these cases the

by one State can not make a valid contract in another, the contracts made through this agency in behalf of the bank out of the State where the bank was chartered would all be void, both as respected the contracts with the government and the individuals who dealt with it. How could such an agency, upon the principles now contended for, have performed any of the duties for which it was established? But it can not be necessary to pursue the argument further. We think it is well settled that by the law of comity among nations, a corporation created by one sovereignty is permitted to make contracts in another, and to sue in its courts; and that the same law of comity prevails among the several sovereignties of this Union. The public and well-known and long-continued usage of trade, the general acquiescence of the States, the particular legislation of some of them, as well as the legislation of Congress, all concur in proving the truth of this proposition.

But we have already said that this comity is presumed by the silent acquiescence of the State. Whenever a State sufficiently indicates that contracts which derive their validity from its comity are repugnant to its policy, or are considered injurious to is interests, the presumption in favor of its adoption can no longer be made. *Bank of Augusta* v. *Earle*, 13 Curtis, 283.

[1] *St. Clair* v. *St. Clair*, 1 Hag. Con. 297.

divorce would be held invalid in the countries where the marriage is celebrated, and valid where the divorce is obtained what rule, is to govern in other countries as to such divorce? Is it to be deemed valid or invalid there? Will a new marriage contracted there by either party be good or not good? These and many other perplexing questions may be put. And it is difficult at the present to give any answer to them which would receive the unqualified assent of all nations." Other perplexing inquiries may grow out of the consideration of the national character of the parties, whether they are both citizens or subjects or both foreigners, or one a citizen and the other a foreigner, whether the marriage was celebrated at home or abroad, whether the jurisdiction of the court pronouncing the decree of divorce is to be founded upon the national character of the parties, upon the celebration of the marriage within the territorial jurisdiction, upon the domicile of the parties, upon the temporary residence of one or both at the time the process is instituted, and if upon any of these grounds the jurisdiction is sustained, another not less important inquiry is whether the law of divorce of the place of the marriage or that of the place where the suit is instituted is to be administered.

One of two conclusions must obtain in order to determine this vexed question. We must either apply the *lex loci contracti* or the *lex domicilii*. In those countries where marriage is held to be indissoluble the former, or the *lex loci contracti*, is contended for. This rule obtains in nearly all Catholic countries, whereas the latter is adhered to in nearly or quite all Protestant countries. The Roman Catholic Church, and the countries subject to its influence, have contended that marriage is a sacrament, and in its effects to be governed by the divine law, and according to their interpretation of that law it is indissoluble.[1]

Pothier says that marriage is not dissolved but by the natural death of one of the parties; while they live it is indissoluble. Story's Conflict of Laws, 174. The Protestants, on the contrary, have not always considered it a sacrament; but the most of them have considered it a civil institution, subject to legislative authority as a matter of public policy and regulation.[2]

[1] See Furguson on Marriage and Divorce, Appendix, note M. 443; *Dalrymple* v. *Dalrymple*, 2 Hag. Cons. R. 63, 64, 67.

[2] Our law considers marriage in no other light than a civil contract. The

In a very important case before the twelve judges in England, on a trial for bigamy, where English subjects were married in England and afterwards the husband went to Scotland and pro-

holiness of the matrimonial state is left entirely to the ecclesiastical law—the temporal courts not having jurisdiction to consider unlawful marriage as sin, but merely as a civil inconvenience. The punishment, therefore, or annulling of incestuous or other unscriptural marriages, is the province of the spiritual courts which act *pro salute animæ*. And taking it in this civil light, the law treats it as all other civil contracts, allowing it to be good and valid in all cases where the parties at the time of making it were, in the first place, willing to contract; secondly, able to contact, and, lastly, actually did contract in the proper forms and solemnities required by law. 1 Blackstone's Com. 432.

Any words of assent in the present tense constitute a valid marriage, unless there exists some positive statute; nor need a clergyman or magistrate be present. It is complete if there is full, free, and mutual consent between the parties capable of contracting, though not followed by cohabitation. *Hantz* v. *Sealy*, 6 Binn. 405.

The maxim of the civil law *nuptias non concubitus sed consensus facit* (Dig. L. 50 tit. 17, § 30), or one of the same import, has ever been regarded in courts of common law as a good definition of marriage. There is an expression in Wood's Institutes of the Laws of England, Inst. 57, which, if examined without its context, might seem to imply that cohabitation as well as consent was required to make a valid marriage. "Marriage or matrimony," he observes, "is an espousal *de præsenti*, and a conjunction of man and woman in constant society;" but the very next sentence is the translation of a Latin maxim similar to the one quoted from the civil law, "Mutual consent," he says, "makes the marriage before consummation." The language of Jacob, in his Dictionary, tit. Marriage, is less liable to misconstruction. He says, "Nothing more is necessary to complete a marriage by the laws of England than a full, free, and mutual consent between parties" not incapable of entering into such a state. Wood, in his Institute of the Civil Law, p. 120, says that "Espousals *de præsenti*, or marriage, is contracted by consent only, without carnal knowledge." *Jackson* v. *Winne*, 7 Wendell, 50.

In regard to the maxim, *nuptias non concubitus sed consensus facit*, the Supreme Court of the United States were equally divided, and gave no opinion (See *Jewell* v. *Jewell*, 1 How. U. S. R. 219); and in the case of *The Queen* v. *Mills*, 10 Clark & Finnelly, 534, in the House of Lords, the lords were equally divided on the same question. The question had been referred by the lords to the judges, and Lord C. J. Tindall, in behalf of the judges, gave their unanimous opinion against the validity of the marriage. "It will appear, no doubt," says Chief-Justice Tindall, "upon referring to the different authorities, that at various periods of our history there have been discussions as to the nature and description of the religious ceremonies necessary for the completion of a perfect marriage which can not be reconciled together; but there will be found no authority to contravene the general position that at all times, by the common law of England it has been essential to a full and complete marriage that there must be

cured a divorce *a vinculo matrimonii* there and then returned to England and married another woman, it was decided that the second marriage was void, and that the husband was guilty of bigamy. It has been commonly supposed that this decision proceeded upon the broad and general ground that an English marriage is incapable of being dissolved under any circumstances by a foreign divorce, and so it was understood by Lord Eldon on a later occasion; but it has been stated by a learned judge in a very recent case, that it turned upon the distinction in point of jurisdiction between a temporary and fugitive residence for the

some religious solemnity, and that both modes of obligation should exist together—the civil and religious; that besides the civil contract, that is, the contract *per verba de præsenti*, which has always remained the same, there has also been a religious ceremony, which varied from time to time according to the variation of the laws of the Church; with respect to which ceremony it is to be observed that whatever at any time has been held by the laws of the Church as a sufficient religious ceremony of marriage, the same has at all times satisfied the common law of England. But it is not to be found in any period of our history, either that the Church of England has held the religious celebration sufficient to constitute a valid marriage unless it was performed in the presence of an ordained minister, or that the common law has held a marriage complete without such celebration. 10 Cl. & Fin. 655, 666. See also *Catherwood* v. *Colson*, 13 Mess. & W. 261, and the observations of Dr. Lushington in *Catterall* v. *Catterall*, 11 Jur. 914, & Stat. 7 & 8 Vic. c. 81 § 83; 5 & 6 Vic. c. 113.

The following authorities may be referred to as explanatory of the laws of Scotland respecting marriage *per verba de præsenti: Dalrymple* v. *Dalrymple*, 2 Hag. Cons. R. 54; *Hamilton* v. *Hamilton*, 9 Cl. & Fin. 327; *Sewart* v. *Menzies*, 8 id.; Shelf on Marriage and Divorce, 91.

In the United States it has been generally held, that a merely civil contract, entered into *per verba de præsenti*, without any ecclesiastical or legal sanction, was a good marriage at common law; 2 Kent, 87–91; *Fenton* v. *Reed*, 4 John. 52; *Clayton* v. *Wardell*, 4 Comst. 230; *Rose* v. *Clark*, 8 Paige, 573; *Hants* v. *Sealey*, 6 Binney, 408; *Chambers* v. *Dickson*, 2 S. & R. 477; *Rodebaugh* v. *Sanks*, 2 Watts, 1; *Town of Londonderry* v. *Town of Chester*, 2 N. H. 268; *Deemaresly* v. *Fishley*, 3 Marshall Ky. 370; *Guardians of the Poor* v. *Nathans*, 5 Penn. Law Journal, 1; *Forney* v. *Hallacher*, 8 S. & R. 159; and especially if such a contract is followed by cohabitation. In the matter of *Taylor*, 9 Paige 611; *Rose* v. *Clark*, 8 id. 574; cohabitation, acknowledgment by the parties, and common repute, are sufficient to raise a presumption of marriage (*Jenkins* v. *Bisbee*, 1 Edwards, 377); but as such circumstances in themselves constitute marriage, they may be rebutted (*Clayton* v. *Wardell*, 4 Comst. 230). But in an action for bigamy such presumptive evidence is inadmissible to establish the fact of marriage; *id.* See, also, *Ford* v. *Ford*, 4 Ala. 142. See further, Am. Ch. Dig. by Waterman, tit. Husband & Wife; Dig. N. Y. Rep. by Hogan, tit. Marriage; *Taylor* v. *Robinson*, 29 Maine, 323; *Tarpley* v. *Poage*, 2 Texas, 139.

purpose of a divorce and a *bona fide* change of domicile by the husband and wife *animo manendi*. We presume, however, that the court, in making the decision, was influenced by both considerations; if by the latter, the decision is in harmony with most of the adjudged cases upon the subject of jurisdiction, for in that case it was the status of the party petitioning for the divorce, and that status was founded upon a *bona fide* residence.[1]

The general question came before the Supreme Court of Vermont, whether a marriage celebrated in Massachusetts could be dissolved by a decree of divorce of the proper State Court of Vermont, both parties being, at the time, *bona fide* domiciled in that State, and the cause of divorce being such as could not authorize a divorce *a vinculo matrimonii* in Massachusetts. The court decided in the affirmative, upon the ground that the actual domicile must regulate the right. The regulations on the subject of marriage and divorce are rather parts of the criminal than of the civil code, and apply not so much to the contract between the individuals as to the personal relations resulting from it, and to the relative duties of the parties; of their standing and conduct in the society of which they are members; and that these are regulated with a principal view to public order and economy, the promotion of good morals, and the happiness of the community.[2]

[1] 2 Kent's Com. 110–117.

[2] The laws of Vermont which authorize the Supreme Court of that State to proceed in suits for divorce instituted in favor of persons resident for a time, but having no settled domicile within the State against persons resident and domiciled in other States who are not and never have been amenable to the sovereignty of the State of Vermont, upon allegations of offenses not pretended to have been committed within the territory of the State, or contrary to the peace, morals, or economy of the society there, or in violation of any contract subsisting or which has ever been recognized there—in short, where no jurisdiction of the parties or of the subject matter can be suggested or supposed – are not to be justified by any principles of comity which have been known to prevail in the intercourse of civilized States. I must be permitted to say, the operation of this assumed and extraordinary jurisdiction is an annoyance to the neighboring States, injurious to the morals and happiness of their people; and the exercise of it is, for these reasons, to be reprobated in the strongest terms, and to be counteracted by legislative provisions in the offended States. But the proceedings in the suit, and the decree of divorce offered in evidence in the case at bar, are not within the reach of this censure, or liable to be impeached on either of the objections which have been considered by this Court. We receive the evidence, therefore, as conclusive, and as proving undeniably the material fact

Most of the Western States have acquiesced in this latter view, treating the *bona fide* residence of the parties or party petitioning, without reference to the law under which the marriage was solemnized, or of the place where the offense was committed, as constituting a sufficient reason for invoking the aid of the court.

A question has been frequently before our courts as to the effect of *ex parte* decrees where the defendant is brought into court by constructive notice and is not personally amenable to the jurisdiction. The ground upon which the validity of these decrees is maintained is, that marriage, being a relation involving the social status of the party to it, the State of which the complainant is a *bona fide* resident has the right to determine his matrimonial status; and in consequence of the new relation that

in issue between the parties, namely, that the marriage which had been between Matthew Barber and the demandant was dissolved in due course of law, and with the sanction of a competent tribunal. *Barber* v. *Root*, 10 Mass. 265.

The rule has since been recognized in the case of *Toney* v. *Lindsay*, 1 Daw's Rep. 117, in the English House of Lords. In that case, the marriage was contracted at Gibralter, within the pale of the English law; the parties were afterwards domiciled in England, and then went to Scotland, and were there divorced, *a vinculo*. Though the House of Lords remitted the cause for review on the whole matter, yet they evidently admit the principle that an English marriage could not anywhere be dissolved except by an act of Parliament; and Lord Eldon observed that it had been so decided lately by the unanimous opinion of the twelve judges of England, though the parties therefore may have been, at the time of the divorce, in Scotland, and domiciled there *bona fide*, yet such a divorce would not dissolve a marriage contract made in England.

See, also, Harg. Co. Litt. 79, b. n. 44; Hub. de conflictu legum; Opinion of Eyre, Ch. J. 2 H. Bl. 410; 3 Mass. Rep. 158.

We are not called upon, in the present case, to pass upon the legal effect of a divorce granted by the Supreme Court of Vermont. Here is a clear attempt of one of our citizens to evade the force of our laws. The plaintiff, to obtain a divorce which our laws do not allow, instituted her proceedings in Vermont while she was an inhabitant and actual resident of this State, and while her domicile continued in this State; for she was incapable, during her coverture, of acquiring a domicile distinct from that of her husband. The plaintiff having acted with a view of evading our laws, it would be attended with pernicious consequences to aid this attempt to elude them.

It may be laid down as a general principle, that whenever an act is done *in fraudem legis*, it can not be the basis of a suit in the courts of the country whose laws are attempted to be infringed. The cases of Briggs and Lawrence, and Clugas and Penaluna, support this opinion without going beyond the point now submitted. The Court are, therefore, of the opinion that judgment must be given for the defendant. *Jackson* v. *Jackson*, 1 John. 432.

may be formed in consequence of the dissolution of the marriage in the State where the decree is pronounced, that public policy requires the recognition of the validity of such decrees in other States.[1]

We have previously referred incidentally to the provisions of the Constitution and statutes of the United States in regard to the admissibility and effect of judgments of one State when sought to be read in the tribunals of another. Such judgments, when authenticated by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with the certificate of the judge, chief-justice, or presiding magistrate, as the case may be, that the attestation of the clerk is in due form, are made admissible evidence in every State in the Union by a statute which provides that the records and judicial proceedings properly authenticated (in the manner as we have before described), shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from whence such records are or shall be taken. This mode of authentication is not exclusive of any other which either of the States may see proper to adopt; neither is the effect of it to be extended to the giving of full faith and credit to judgments and proceedings in criminal cases; neither is the conviction of an infamous crime in a foreign country or in any of the United States to be held to render the person convicted an incompetent witness out of the State where convicted. The judicial proceedings referred to in the acts of Congress are also construed to apply to proceedings of courts of general jurisdiction; for it requires the certificate of the clerk, the judge, chief-justice, or presiding magistrate; and in order to have this character of authentication, the court must be so constituted as to admit of such officers. The records of magistrates who may be vested with limited judicial authority varying in its objects and extent in the different States are to be governed by the law of the State into which they may be introduced for the purpose of being carried into effect.[2]

[1] *Cox* v. *Cox*, 19 Ohio S. 502.

[2] The Act of Congress passed in 1790* prescribes the mode of authentication, but we should say, except for the decision of the Supreme Court of the United

*1 Cong. 2d. Sess. c. 11.

The judgments and records of justices of the peace have, therefore, been held not to be within the meaning of these Constitutional and statutory provisions,[1] but any court of record, having a judge, a clerk, and a seal, whether it be a court of Chancery, of common law, or of probate, may be approved in the manner directed by the statute. Where the record offered in evidence is not authenticated, in accordance with the provisions of the Act of Congress, it may still be used in evidence if it is authenticated in accordance with the statute of the State where such record is offered in evidence. The authentication in such case does not depend upon the law of the State under which such record was made, but rather upon the law of such State wherein such record is sought to be used. In addition to these modes of authentication of records so as to entitle them to be read in evidence, there is a common law mode of proof, by which a witness who has compared the copy with the original may establish the

States, has not determined the effect, for it only provides, in the words of the Constitution, for the "faith and credit" to be given to acts, etc., so authenticated, leaving the effect uncertain as it was by the Constitution. But without calling in question these decisions let us see to what records they apply. Certainly we think the judicial proceedings referred to in the Constitution were supposed by the Congress, which passed the act providing the manner of authenticating records, to have related to the proceedings of courts of general jurisdiction, and not to those which are of merely municipal authority, for it is required that the copy of the record shall be certified by the clerk of the court, and that there shall also be a certificate of the judge, chief-justice, or presiding magistrate, that the attestation of the clerk is in due form. This is founded upon the supposition that the court whose proceedings are to be thus authenticated is so constituted as to admit of such officers, and the act has wisely left the records of magistrates, who may be vested with limited judicial authority, varying in its objects and extent in every State, to be governed by the laws of the State into which they may be introduced for the purpose of being carried into effect. Being left unprovided for by the Constitution or laws of the United States, they stand upon no better footing than foreign judgments, being not more than *prima facie* evidence of debt, and liable to be defeated in their operation, under the plea of *nil debet*, as other foreign judgments are. *Warren* v. *Flagg*, 2 Pick. 449.

[1] By the Court, Sutherland, J. This being an action of debt upon a justice's judgment rendered in the State of Pennsylvania, it was incumbent upon the plaintiff to show that the magistrate had jurisdiction of the subject matter of the suit as well as of the person of the defendant. Courts of justices of the peace are not courts of record. They do not proceed according to the courts of the common law. 1 John. Cas. 20 3. John. R. 429. They are confined strictly to the authority given them by statute, and can take nothing by implication, but

contents of the record. In such case it is not necessary for the person examining to exchange papers and read them alternately; but it should appear, before the copy is admissible in evidence, authenticated with this ancillary proof, that the record from which the copy was taken was in the hands of the proper custodian, whose duty it was to keep it. And this fact can not be shown by any inference drawn from the record itself; nothing can be borrowed until it has been proven that the original come from the proper court. When the record is lost or destroyed, or is very ancient, its existence and contents may sometimes be presumed;

must show their authority in every instance, and must comply with the forms prescribed by the law creating them. 1 John. Cas. 228; 1 Caines's R. 191, 594, n. a. 3 Caines's R. 152. A court of general jurisdiction is presumed to have acted in each particular case by competent authority, and its records are evi dence not only of its acts but of its jurisdiction. *Wheeler* v. *Raymond*, 8 Cowen, 311. But the rule is different with reference to inferior courts, their jurisdiction must always be shown. *Mills* v. *Martin*, 19 John. R. 33, and cases there cited; *Borden* v. *Fitch*, 15 id. 140, 13 id. 39; *Andrews* v. *Montgomery*, 19 id. 162. It appears affirmatively in this case that justices' courts in the State of Pennsylvania were created and organized by statute. The superior courts of that State would take judicial notice of the authority and jurisdiction conferred by statute upon these courts; but the courts of another State have no judicial knowledge of the statute laws of Pennsylvania. It was essential, therefore, in order to show what faith and credit would be given to the judgment of these courts in Pennsylvania, to produce and prove the authority under which they were organized and proceeded; this could only be done by producing and proving the Statute by which they were created. If that showed that the subject matter was within the jurisdiction of the justice's court, and the proceedings appeared from the record to have been in conformity with the directions of the statute then it would be entitled here to full faith and credit. *Mills* v. *Duryee*, 7 Cranch, 481; *Shumway* v. *Stillman*, 4 Cowen, 292; *Thomas* v. *Robinson*, 3 Wendell, 268.

In *Sollers* v. *Lawrence*, Wills, 416, the language of the Court in speaking of courts of limited jurisdiction, is this: "The rule is that nothing must be intended in favor of their jurisdiction, but that it must appear by what is set forth on the record, that they had such jurisdiction. A justice of the peace at common law has no jurisdiction in civil matters; he is a mere conservator of the peace. It is only by virtue of the Fifty-dollar Act that he has jurisdiction in an action of debt, or any other civil action between individuals; but it is not stated that the justice, by virtue of that statute, issued any process, or held a court, or that the plaintiffs levied any plaint before him in relation to any matter within his jurisdiction. According to all the decisions, the facts should have been stated and the statute under which the justice acted. *Cleveland* v. *Rogers*, 6 Wendell, 442.

or secondary evidence is admissible under such circumstances to prove its contents, especially when the case does not disclose the existence of other and better evidence.[1]

CHAPTER V.

PUBLIC DOCUMENTS.

WHEN papers are officially in the custody of a person he may be compelled, by a rule of court, to allow an inspection of them, even if it furnish evidence in a civil action against the person himself. But an ecclesiastical tribunal has no such authority. Such tribunal can neither compel the person in whose custody the papers are intrusted to allow an inspection of them, nor can he be compelled to furnish copies without the aid of a court of equity, which might, under certain circumstances, be invoked, as Courts of Chancery, on a proper case made by bill, will compel

[1] Records generally are to be proved by inspection or by copies properly authenticated; but, if there be sufficient proof of their loss or destruction, much inferior evidence of their contents may be admitted. In the case before us it is agreed that for more than thirty years past the inhabitants of West Stockbridge have exercised and enjoyed all the powers, privileges, and immunities of a town. They have been admitted to the right of representation to the general court, have been assessed in their proportion of all State and county taxes; and, by many other acts and proceedings, their existence as a corporation has been recognized by the legislature.

But the act of incorporation is not to be found, nor can any record relating to it be discovered in the secretary's office. From the facts, however, the presumption is violent, that the town has been regularly incorporated, and that the record has in some way been lost or destroyed. The existence of the record is also proven by the deposition in question, and it can not be doubted that parol evidence is competent to prove the existence and loss of a record. This, then, being satisfactorily proved, secondary evidence of the incorporation of the town is clearly admissible by the rules of evidence. *Inhabitants of Stockbridge* v. *Inhabitants of West Stockbridge*, 12 Mass. 401.

See, also, *Dillingham* v. *Snow et al.* 5 Mass. R. 547; 3 Mass. R. 276; *Klock* v. *Richtmeyer*, 13 John. 367; *Schauber* v. *Jackson*, 2 Wend. 60; *Matthews* v. *Trinity Church*, 3 Serg. & Rawle, 509; *Hathaway* v. *Clark*, 5 Pick. 490; Farrar's Case, Skin. 78; 1 Eden, 269; Cawp. 215; 6 East, 215; 2 Ves. Jr. 583; 1 Jac. & Walk. 63; *Rex* v. *Montague*, 4 B. & C. 538; *Mayor of Hull* v. *Homer*, Cawp. 102: 3 D. & E. 158; Matthews, 199–195; Greenleaf on Evidence, 553.

a discovery in aid of proceedings in other tribunals when necessary to the furtherance of justice. But when books and papers are in the hands of a person not a party to the suit, and are wanted as evidence, resort must be had to a subpœna *duces tecum*, and when the complainant wishes to obtain their custody, such person must be made a party defendant.[1] But an excep-

[1] The Chancellor said: "The Court had no jurisdiction over the appellant, he not being a party to the suit, to compel him to deliver over the books and papers in his possession to the Master with a view to their delivery to the receiver. He was a mere witness before the Master, and if these books were wanted as evidence in relation to any matter of inquiry upon the reference, the proper course to obtain the books for that purpose was to serve the witness with a subpœna *duces tecum* to attend with the books and to give evidence in relation to the same. But neither the Master nor the Court, even in that case, would have the right to take the books out of the possession of the witness and deliver them over to the receiver without the consent of such witness, or to allow them to be used for any other purpose than as mere evidence upon the subject of the inquiry which was properly before the Master upon the reference. A case very similar to the one now under consideration came before the Court of Review in England in August last. There, the attorney of the bankrupts had in his possession a deed belonging to them which he refused to deliver to the solicitor of the assignee, claiming a lien on such deed for professional services. He was thereupon summoned as a witness before the Commissioner in Bankruptcy to be examined touching the estate of the bankrupts and to produce the deed upon his examination. He attended accordingly and produced the deed; and the Commissioner having decided that the witness had no lien upon the deed, ordered him to deliver it up, which he declined to do until his lien was paid. The Commissioner then ordered the officer of the Court to take the deed from him, which was accordingly done. But upon appeal to the Court of Review, the chief judge, Sir James Lewis Knight Bruce, said the Court could not, in this way, decide as to the validity of the alleged lien, and that the Commissioner might as well have taken from the witness the suit of clothes in which he came to Court as to take the deed upon which he claimed to have a lien.* So in the case under consideration, the appellant was a mere witness before the Master upon the reference, and the Court had no jurisdiction over him except in that character. It had no right, therefore, to order him to deliver up the books in his possession whether his claim to such possession was or was not well founded. The agency of the appellant, as he testified, had ceased before the commencement of this suit; and if the complainants wished to obtain possession of these books on the ground that he improperly withheld them, they should have made him a party to their suit either by an amendment to their bill or otherwise, so as to enable the Court to extend the receivership to him so far as related to the books in his possession. Or if they merely wanted the books as evidence before the Master upon the reference, they should have called upon him to produce them as evidence

*See *ex parte* Llewellyn, 8 Lond. Jur. Rep. 816.

tion to this rule is allowed when the discovery is sought against an officer of a corporation for the purpose of discovering entries and orders made in the books of the corporation.[1]

All persons have not an interest in public documents to the extent that would entitle them to an inspection, and where an inspection has been refused, upon application to the court by a party claiming the right, he should show some interest in the document, and that he requires it for a proper purpose; and upon such showing a court of law might award a writ of *mandamus;* and this may be done whether an action is pending or not. Thus, where a board of directors of a bank by resolution excluded one of its members from an inspection of its books, alleging in such resolution that they believe him to be hostile to the interests of the institution, a peremptory writ of *mandamus* was awarded against the other directors and cashier of the bank, commanding the cashier to submit the books to the inspection of the relator.[2]

Records and documents sometimes partake both of a public and private character, and are regarded as one or the other ac-

by a subpœna *duces tecum* in the usual way. *Morley et al.* v. *Green et al.* 11 Paige, 241, 242.

[1] It is the settled law in this country and in England, that in a bill against a corporation for relief, its officers and agents who are cognizant of the facts to which it relates, may be made defendants for the purpose of obtaining an answer on oath which can not be obtained in any other way. Story's Equity Pl. 201, § 235; 1 Paige, 37–219; 5 Price R. 491. The decision of Sir John Leach in the case of *How* v. *Bist & Hase* (5 Mad. Rep. 19), is perfectly reconcilable with the uniform current of decisions on this subject. *Many* v. *Beekman Iron Co. et al.* 9 Paige, 193.

See, also, St. Eq. Pl. § 235; St. Eq. Jurisp. § 1501; Dan. Pl. and Pr. 178 *et seq.;* Cooper's Eq. Pl. 41, 42; Mitf. Pl. 188, 189; *Glascott* v. *Copper Miners' Co.* 11 Sim. 305, per Sir L. Shadwell, V. C.; *Bramley* v. *Westchester Co. Mf. Co.* 1 J. C. R. 366; *Lawyer* v. *Cipperly,* 7 Paige, 281; *Fulton Bank* v. *Sharon Canal Co.* 1 Paige, 219; *Wright* v. *Daure,* 1 Metc. 237; *Walker* v. *Hallett,* 1 Ala. Rep. (N. S.) 379.

[2] If there is a right on the part of the relator to examine the books, either with reference to his own safety or with a view to a proper execution of the trust reposed in him by the stockholders, then this is the remedy, and the only remedy, in a court of law. The question, then, seems to be this: Has every director of a bank a right to know the transactions of his co-directors in relation to the management of the institution? The stating the question furnishes the answer. *The People* v. *Throop,* 12 Wendell, 185.

cording to the relation in which the applicant stands to them. Books and records of a corporation are private with respect to strangers, and public as respects its members or stockholders. The former have no more right to examine them than they would to examine the books of a private individual. Such books, as to mere strangers, are, in the strictest sense of the term, private; but a different rule obtains in favor of the stockholders and officers. And a rule for an inspection of the writings of the corporation will be granted in favor of its members as a matter of course, where such inspection is shown by the applicant to be necessary in regard to some particular matter in dispute, or where the granting of such rule is necessary to enable the applicant to perform his duty or to prevent him from suffering an injury; under such circumstances, however, the inspection will be allowed only so far as it was shown to be essential.[1] An inspection, however, is only granted in furtherance of civil rights; for it is a constant and invariable rule, that in criminal cases the party shall never be obliged to furnish evidence against himself. Thus, an inspection of the books of the Post-office has been refused upon the application of a complainant in a *qui tam* action against a clerk in the Post-office for interfering in the election of a member of Parliament because the action did not relate to any transaction in the Post-office, for which alone the books are kept.[2] So, also, inspections of books and documents may be refused on grounds of public policy, where the disclosure sought is considered detrimental to the public interest.

The authentication of public documents which are not judicial may be proved by the great seal of the State, by the production of the original printed document from a press authorized by the government, by printed copies of public documents transmitted to Congress by the President of the United States and printed by the printer to Congress, by the certificate of a foreign governor properly authenticated, by a copy proved on oath to have been examined by the roll itself or by an exemplification under the great seal, or in most, if not all, of the United States legislative acts, may be proved by printed copies of the laws and resolves

[1] *Rex* v. *Merchant Tailors' Co.* 2 B. & Ad. 115.

[2] *Crew* v. *Blackburn*, 1 Wils. 240.

of such legislature published by its authority, which is sufficient *prima facie*, for the book offered in evidence purports upon its face to have been so printed.[1]

There are, however, as we have already seen, certain matters that courts will judicially take notice of. Thus, they will take notice of the Constitution and political frame of the general government, and of the States under which they are organized, and of the political agents and officers of the government, the great seal of the State, and of its judicial tribunals, the seal of state of other nations which have been recognized by our gov-

[1] The language of Chief-Justice Marshall, in *Church* v. *Hubbard*, 2 Cranch, 236, has been cited in this Court by Mr. Justice Sutherland (6 Cowen, 429). Foreign laws are well understood to be facts which must, like other facts, be proved to exist before they can be received in a court of justice. The rule, he says, is applicable to them, that the best testimony shall be produced; and that such testimony as presupposes better testimony attainable by the party, shall not be received; but no testimony shall be required that is shown to be unattainable. They should be authenticated by the authority of the foreign State under its seal; or it should be shown that such evidence could not be procured. A sworn copy also appears to be competent testimony; but a copy certified by a consul has been held to be insufficient. *Lincoln* v. *Battelle*, 6 Wendell, 482.

Congress, under the power given to it by the Constitution, has provided "that the acts of the Legislatures of the several States shall be authenticated by having the seal of their respective States affixed thereto." Act of May 26, 1790, 1 Story's Laws, 93. The plaintiffs have given themselves needless trouble. It was not necessary to verify the seal either by the certificate of the governor or the oath of a witness. The seal proves itself, and imports absolute verity, and until the contrary appears, the presumption is that it was affixed by the proper officer. *The U. S.* v. *Johns*, 4 Dall. 412; 1 Washington C. C. 363, S. C.; *The U. S.* v. *Amedy*, 11 Wheaton, 392; *The State* v. *Carr*, 5 N. H. R. 367; *Coit et al.* v. *Millikin et al.* 1 Denio, 376.

The Amended Code (Sec. 426) declares that the printed statutes of another State "shall be admitted by the courts and officers of this State on all occasions as presumptive evidence of such laws, and that the unwritten or common law of every other State may be proved as facts by parol evidence, and the books of reports of cases adjudged in their courts may be admitted as presumptive evidence of the law. The statutes of other States, it has always been held, are to be proved as matters of fact. The code simplifies the mode of proof by enacting that it may be made by producing a printed volume purporting to be by the authority of the State Government in which the statutes are contained. This is made presumptive evidence of its existence. *Hunt* v. *Johnson*, 44 N. Y. 32.

See, also, *Farmers' and Mechanics' Bank* v. *Ward*, 4 Law Report, 37; *Packard* v. *Hill*, 2 Wendell, 411, S. C.; 5 *ibid.* 375; *Chanoine* v. *Fowler*, 3 *ibid.* 173; *Munroe* v. *Guilleaume*, 3 Keyes, 30, S. C. 3 Abb. Dec. 334.

ernment, the seals of foreign courts of admiralty, the seals of notaries public, and also public statutes.[1] Courts will also take notice without proof of a private statute where a clause is inserted in it that it should be taken notice of as though it were a public act, or that it shall be taken and construed as a public act. But in regard to journals of either branch of the legislature they may be proved by examined copies, or they may be proved by copies printed by the government printer by authority of the House; upon the same principle the journals of a general or of an annual conference may be proved by examined copies printed by the authority of the conference. And if they were offered in evidence before an ecclesiastical tribunal, and examined as a certified copy duly authenticated by the custodian of the original journal of the Church, they would be received in evidence by our civil courts.

In many of the States, certified copies from the books and records of private corporations are made evidence by statute; and in those States, the records and documents pertaining to the affairs of the Church would be so far regarded as public records and documents as to constitute an exception to the general rule which requires the production of the best evidence. From the fact that it would always be difficult and often impossible to prove facts of a public nature by means of actual witnesses upon oath, books kept by persons in a public office, and official registers, whether authorized by statute or by the nature of the office, are admissible in evidence, notwithstanding their authenticity is not confirmed by the ordinary tests of truth; that is, the obligation of the oath and the power of cross-examination. This examination is founded on the circumstance that such books and official registers have been made by the authorized agents of the government appointed for that purpose, and in addition thereto, that the matters recorded therein are of public notoriety, and it may be, for the further theoretical reason growing out of the doctrine of principal and agent, that the people of the State may be supposed to be privy to the investigation; and, therefore, that it is not necessary that they should be confirmed and sanctioned by the oath of the party making them. Books of this public nature

[1] Story on Conflict of Laws, 643; *Robinson* v. *Gilman*, 7 Shepl. 299.

being themselves evidence when produced, their contents may be proved by a copy duly authenticated, and the book itself will not be required to be produced, only when a question arises as to its identity, or the handwriting, or where a doubt arises as to its authenticity. Where by the ecclesiastical canons an inquiry is directed to be made from time to time of the temporal rights of the clergyman in every parish to be returned to the bishop's registry. This return, which is denominated a terrier, is held to be admissible in evidence by the English courts, in accordance with the principle, that to entitle a book to official character it is not necessary that it be required to be kept by an express provision of a statute nor that the nature of the office should render the book indispensable. It will be sufficient if it be kept by the direction of proper authority and in pursuance of such authority and direction. By the statutes of the State of Iowa, books of history, science, and art, also published maps and charts, made by persons indifferent between the parties are presumptive evidence of facts of general interest. Code of 1851, § 2492. But all evidence of this sort must be considered as mere hearsay, and as such is not of a very satisfactory character. Historical facts, however, of general and public notoriety, may be proven by reputation, and that reputation may be established by historical works of known character and accuracy; but evidence of this sort is confined in a great measure to ancient facts which do not presuppose better evidence in existence; and when from the nature of the transaction, or the remoteness of the period, or the public and general reception of facts, a just foundation is laid for general confidence.[1] But the work of a living author, who is within the reach of process of the court, can hardly be deemed of this nature. He may be called as a witness. He may be examined as to the source and accuracy of his information; and especially if the facts which he relates are of a recent date, and may be fairly presumed to be within the knowledge of many living witnesses from whom he has derived his materials.[2] For this reason the statements of the chroniclers, Stow and Sir W. Dugdale, were held inadmissible as evidence that a person took his

[1] 1 Starkie's Ev. pl. 1, §§ 40–44, pp. 60–64; id. pl. 2, § 55, pp. 180, 181.
[2] Bull. N. P. 248, 249.

seat by special summons to Parliament in the reign of Henry VIII. The general rule in regard to certificates given by persons in official station is that the law never recognizes or allows such certificate as to a mere matter of fact, unless the same is authorized by a statute. If the officer was bound to record the fact, then the proper evidence is a copy of the record duly authenticated; but as to matters that he was not bound to record, his certificate is extra-official, and is entitled to no greater weight than the statement of a private person, and is therefore not admissible in evidence.[1]

Where an officer's certificate is made evidence of certain facts he can not extend its effect to other facts by including them in the certificate; but such unauthorized facts will be suppressed. The same principle applies to the return of an officer. Thus, an officer's return on a writ of attachment that he gave the defendant a copy of the writ at a place out of his precinct is extra-official, and is not evidence of notice to the defendant.[2]

[1] Clerks of religious and other corporations, and other recording officers, may make and verify copies of their records; and in doing so act under the obligation of their oath of office. Of the verity of such copies their certificates are evidence. But it is no part of their duty to certify facts, nor can their certificates be received as evidence of such facts. *Oakes* v. *Hill*, 14 Pick. 448.

The certificate of the justice states that the defendants, on the trial, claimed to have the rent secured by the covenant allowed to them by the jury in making up their verdict. I incline to think that the fact stated by the justice, to-wit, that the defendants claimed to have the rent allowed them by the jury, is extra-judicial, and regularly no part of his record. The certificate of a justice must contain the process, pleadings, evidence, verdict, and judgment. Beyond these he is not called on to certify. If he goes further his statements conclude no one. *Wolf* v. *Washburn*, 6 Cowen, 265.

An account stated at the treasury department, which does not arise in the ordinary way of doing business in that department, can derive no additional validity from being certified under the Act of Congress. Such a statement can only be regarded as establishing items for moneys disbursed through the ordinary channels of the department, where the transactions are shown by its books. In these cases the officers may well certify, for they must have official knowledge of the facts stated. But where moneys come into the hands of an individual, as in the case under consideration, the books of the treasury do not exhibit the facts, nor can they be officially known to the officers of the department. In this case, therefore, the claim must be established not by the treasury statement, but by the evidence on which that statement was made. *United States* v. *Buford*, 8 Curtis, 270.

[2] The Court were of the opinion that it was apparent upon the record that

CHAPTER VI.

PRIVATE WRITINGS.

UNDER this head may be comprised all writings which are not of a public character, and are not treated of in any of the preceding chapters, and from their very nature when produced in evidence they must be proved to be genuine, for they do not, like public acts of legislation and public records, prove themselves; therefore, when produced, their execution must be proved, or, if they are lost or destroyed, their absence must be duly accounted for, and their loss supplied by secondary evidence of their contents. Where the instrument is lost the party is required to make some proof that such instrument existed; that a diligent search has been made for it in the place where it was most likely to be found. If the nature of the case admits of such proof, evidence of this character is addressed to the court or other presiding officer, and is not for the consideration of the jury or committee. And in determining it, the party will not be restricted to facts peculiarly within his knowledge, but will be permitted to state other facts, such as the search for the instrument elsewhere than amongst his own papers, inquiries made of other persons who were shown to have been custodians of it, and their replies to such inquiry.[1]

the original defendant was not summoned, and that he had no notice of the suit, as the officer's return in regard to the fact of leaving a copy of the writ, was extra-official, and, if the notice in any form would have rendered the attachment valid, the officer's return was not evidence of any such notice. *Arnold* v. *Tourtellot*, 13 Pick. 174.

[1] The practice that prevails of allowing a party or an interested person to testify to certain matters in the progress of a cause does not arise from the necessity of the case, or because he alone is supposed to possess the knowledge of the facts to be shown as was urged on the argument, but it is permitted because the evidence is collateral and addressed to the Court. Hence we daily see parties testifying to matter of which other persons might be as well informed as they, such as a notice to produce papers, the death of a subscribing witness, or that he is out of the State, or the like. The cases cited by the plaintiff's counsel show the rule to be well settled both in this Court and in the court for the correction of errors. This practice is entirely familiar, and it appears difficult to see any difference in principle between it and the right of the plaintiff here to

The question has often been raised whether secondary evidence of the contents of a private writing is admissible where the writing was shown to be beyond the control of the parties seeking to use it, and out of the jurisdiction of the court, so that its production would not be enforced by the order or decree of a Court of Chancery upon a bill for discovery or otherwise, or upon a subpœna *duces tecum*. The authorities are not uniform. In Connecticut it was held that secondary evidence was not admissible.[1] The same rule was adhered to in Louisiana.[2] But it is believed that the weight of authority is the other way; and such certainly would be in harmony with the reason of the rule.[3] It was held by the Supreme Court of New York, that an instrument having been executed at Caraccas, and it appearing according to the law of that place that the original was deposited with the notary and kept by him, the parties only being allowed to have certified copies, that this was sufficient to account for the non-production of the original.[4] The same rule prevails where the instrument is destroyed without the fault of the party claim-

be allowed to testify to a search at large for the paper of which he sought to give parol evidence. As far as I am informed it is usual to allow a party to give evidence by his own oath of search generally for papers asserted to be lost or destroyed. *Vedder* v. *Wilkins*, 5 Denio, 65.*

[1] *Townsend* v. *Atwater*, 5 Day R. 298.

[2] *Lewis* v. *Batty*, 8 Mart. Lou. Rep. 287, 288, & 289.

[3] 3 Monroe, 532; *Bailey* v. *Johnson*, 9 Cowen, 115; *May's Ad.* v. *May*, 1 Porter, 131; *Bunch's Admrs.* v. *Hurst's Admr.* 3 Dess. eq. R. 290, 291.

[4] With respect to the instrument by which it is alleged that the plaintiff became security for the defendant, the proof is abundantly sufficient to show that the original could not be produced on the trial. According to the laws of the Spanish Province where this instrument was executed, the original, or the one actually signed by the parties, remains with the notary before whom it was executed. Copies, certified and signed by the notary, are delivered to the parties; and such copies, thus authenticated, are received in evidence in all the Spanish tribunals. It is unnecessary definitely to say whether the *lex loci* ought so far to prevail as to require these notarial copies to be admitted in evidence here in the same manner as in the Spanish tribunals. I am inclined to think, however, they ought not to be received as sufficient *per se*, but I can not think they are to be entirely disregarded and treated as mere nullities. They ought to be received as forming a part of the inferior evidence of the execution of the instrument where the original can not be produced and proved. *Mauri* v. *Heffernan*, 13 John. 72.

*See, also, *Jackson* v. *Frier*, 16 John. 193; *Chamberlain* v *Gorham*. 20 id. 144; *Dan* v. *Brown*, 4 Cowen, 483; *Jackson* v. *Betts*, 6 id. 377.

ing the benefit of it. What degree of diligence in the search for a lost or destroyed instrument is necessary in order to lay the foundation for the introduction of secondary evidence is not easily defined; each case must, to some extent, depend upon its own peculiar circumstances and the sound judicial discretion of the court or other presiding officer. The question whether the loss or destruction of the instrument is sufficiently established to admit secondary evidence of its contents, is to be determined by the court; but the party should show that he has in good faith exhausted, to a reasonable degree, all the sources of information and means of discovery which are accessible to him. If, however, the instrument or paper was supposed to be of no value, or of the character of papers which are not ordinarily preserved, or is ancient, a less degree of diligence will be required. And where such paper or instrument is required to be kept or deposited in a public office or other particular place, such office or place must be searched. If it belong to the custody of certain persons, or is shown to have been in their custody or possession, they should in general be called and sworn to account for it if they are within reach of the process of court. It would be sufficient, probably, if proof was made by a person who saw the search conducted, taking in connection the declarations of the parties making such search. Such declaration, if made at the time of the search, may properly be considered as part of the *res gestæ*, and therefore admissible. If the instrument was executed in duplicate or triplicate, the loss of all the parts must be proved in order to lay the foundation for the introduction of secondary evi dence. Before secondary evidence can be resorted to for proof of the contents of a lost instrument, it must ordinarily be proved to have been executed.[1] It is sometimes made a question where

[1] I think there is a material distinction between papers and writings which cease to be of any use or value or any evidence of title, and such as are the muniments of one's title. ' In the first case, the slightest proof of loss, or even presumption from lapse of time of a loss, ought to entitle the party to give evidence of the contents; whilst in the other case, the proof should be more strict. We have high authority for saying that the rigor of the law has been relaxed on the subject of proving the loss of papers. *Livingston* v. *Rogers*, 1 Caines's Cases in Error, 28; *Jackson* v. *Root*, 18 John. 73.

See 3 Hawk's Rep. 364; *Tate* v. *Penn*, 7 Mart. Lou. Rep. N. S. 448, 551; *Eure* v. *Pittman*, 3 Hawk's Rep. 364; *The Utica Ins. Co.* v. *Caldwell*, 3 Wen-

an instrument is lost or destroyed, that has been witnessed, whether it is necessary to call the attesting witnesses. In some of the cases it has been held that the execution of the instrument, as well as its contents, may be proved by the admission of the party.[1]

The production of an instrument in writing in which another

dell, 296; *Taylor* v. *Riggs*, 1 Peters, 591, 596, 597; *Patterson* v. *Winn*, 5 Peters, 242; *Jackson ex dem. Bush* v. *Hashbrouck*, 12 John. 192; *M'Canhay* v. *The Center and Kishacoquillas Turnpike Co.*, 1 Pennsylvania Rep. 426; *Jackson* v. *Russell*, 4 Wendell, 543; *Proprietors, etc.* v. *Battles*, 6 Vermont Rep. 399; *Rochell* v. *Holmes*, 2 Bay's Rep. 487.

[1] If the confessions of the defendant, either by parol or in writing, are at all to be received in evidence, they are amply sufficient, in this case, to show a due execution of the instrument whereby the plaintiff became his surety. This instrument was not under seal, so that no objection on that account can be made. I can see no objection, nor, indeed, were any made on the trial, to the admissibility of such evidence. *Mauri* v. *Hffeernan*, 13 John. 74.

It appears, indeed, to be a technical rule in the English courts not to allow the confessions of the party to be evidence of the execution of sealed instruments, but to require the attendance of the subscribing witness, unless it appear that he can not be procured. Doug. 216, 217; *Abbot* v. *Plumbe*. I have not met with any adjudged cases before the Revolution in which this rule is laid down, and therefore think we are at liberty to decide this case on principle and on the analogy it bears to other cases. It is a sound principle, that the voluntary confessions of a party are the highest evidence, and in cases affecting life and personal liberty, this rule is daily admitted and practiced upon. It is another principle admitted in the case of *Abbot* v. *Plumbe* (Doug. 216), that if the subscribing witness deny the execution of a deed, you may prove it *aliunde*. From these considerations, that we are unfettered by any positive adjudication anterior to the Revolution, that the party's own confession is the highest evidence, and that you may contradict the subscribing witness, I think it results that an instrument, though attested by a subscribing witness, may be proved by the confession of the party who gave it. Allowing evidence of confession does not touch upon the rule that requires the best evidence of which the nature of the case is susceptible. That rule means only that inferior evidence shall not be given when higher evidence is in the possession of the party, or is presumed to be within his power. The confession of a party that he gave a note, or any instrument precisely identified, is as high proof as that derived from a subscribing witness. The notion that the persons who attest an instrument are the only witnesses agreed upon to prove it, is not conformable to the truth of transactions of this kind, and, to speak with all possible delicacy, is an absurdity. At *nisi prius*, for some years past, the subscribing witnesses have been dispensed with on proof of the confession of the party who gave the instrument. To allow such evidence is highly convenient, and produces no manner of injury. *Hall* v. *Phelps*, 2 John. 451.

See, also, *Thomas* v. *Harding*, 8 Greenlf. 417; *Corbin* v. *Jackson*, 14 Wendell, 619.

person has an interest may be enforced either by a bill in Chancery, by an order of the court where it is shown to be in possession of the opposite party, or by a subpœna *duces tecum* directed to the person who has them in possession. Since the passage of the statute in the several States making parties competent witnesses without regard to their interest, we presume that the same form of process may be used to compel the production of private writings in their possession that is used to compel the production when in the possession of third persons. Where the writings are in the possession or under the power and control of the adverse party, in addition to the means to compel their production that we have before enumerated, the practice is to give such adverse party or his attorney notice to produce the original, or that, upon a failure so to comply with such notice, evidence will be given of their contents. But before a party can be called upon to produce a document for the purpose of evidence it must be shown to be in his possession.[1]

Notice to produce the writing should be sufficiently explicit to apprise the opposite party of the character of the instrument. And where the instrument is not produced in obedience to the notice, such notice is not sufficient to admit the party to give secondary evidence of its contents; he must prove the existence of the original. If, however, the instrument is produced in obedience to the notice, no proof of its execution is required, its production by the party being an implied admission that the writing is genuine. After notice and refusal to produce a paper, and secondary evidence given of its contents, the adverse party can not offer the instrument in evidence in contradiction of the secondary evidence. To allow such practice would be to experiment with the court and the opposite party.[2] A notice to produce a written instrument may be given either verbally or in writing, and may be served upon either the party or his attorney. When the notice is in writing it may be directed to the party or his attorney, and may be served on either. It must describe the writing with such particularity to apprise the opposite party of the particular instrument or writing intended to be called for. As to the time

[1] *Laxton* v. *Reynolds*, 28 Eng. Law & Eq. 558.
[2] *Doe* v. *Hodgson*, 4 P. & D. 142.

of serving of notice, no definite rule can be established. All that the law requires is, that it be a sufficient notice to enable the opposite party to comply with it. If it should appear that the paper was with the party in court present at the trial, a motion for the production of such paper during the progress of the trial is held to be reasonable notice.[1]

As the law now stands in most of the States, the party may be called and examined as to his possession of the instrument in question; or the party seeking to charge him with its possession may make out and establish the fact by other and independent evidence. When the party resides at a distance from the place of trial, a service on him at the place of trial, or after he has left home on the day set for the trial, is not ordinarily sufficient, unless the case should happen to be continued. But where a party has gone abroad, leaving his case to the management of his attorney, it will be presumed that he left with his attorney all the papers and documents material to the case, and a notice served on the attorney at the place of trial would be sufficient.[2]

A party being called upon for the production of an instrument which he is entitled to retain until the commencement of the trial, and he refusing to produce it until that time, will not entitle the opposite party to introduce secondary evidence to prove its contents. The production of a book or other writing upon notice does not make it evidence in the cause unless the party calling for it inspects it so as to make himself acquainted with its contents. The English rule is, that when it is so examined it becomes evidence for both parties. But our American courts are not uniform on the question. The English rule was adopted in *Jordan* v. *Wilkins*, 2 Wash. C. C. 482, 484, and in many other reported cases.[3]

[1] It must be an extraordinary case where a motion to produce a paper, given during the progress of the trial, can be held to be reasonable. But if it should be apparent that the paper was with a party in court present at the trial, such a notice might be said to be reasonable. But, surely, where the paper is not in court, and no proof that it was ever in the possession of the party notified, such short notice can not be reasonable. *Choteau et al.* v. *Raitt*, 20 Ohio, 147.

[2] 2 M. & Rob. 179.

[3] *Randel* v. *Chesapeake & Del. Canal Co.* 1 Harrington, 233, 284; *Penobscot Broom Co.* v. *Samson*, 4 Shepley, 224; *Anderson* v. *Root*, 8 Sm. & M.

But Spencer, in delivering the opinion of the Supreme Court of New York, denied the correctness of the English rule; and said that it appeared to him that the notice to produce a paper and calling for its inspection ought to be considered as analogous to a bill for discovery, where most certainly the answer is not evidence but for the adverse party. Probably the better rule is the one laid down by the Supreme Court of Pennsylvania, where it was held that where books are produced on notice and entries read in evidence by the party calling for them, the party producing them may read other entries necessarily connected with the former entries; thus modifying to some extent the English and American decisions on this question; or at least taking a middle ground, and one that is admitted by both sides to be tenable. Where a written instrument appears to have been altered it is incumbent on the party offering it in evidence to explain this appearance. Probably this rule would not obtain where the instrument was produced by the opposite party on notice and offered

362; *Reed* v. *Anderson*, S. J. C. Mass. Middlesex Oct. Term, 1853, Law Rep. July, 1858, p. 169.

The English rule seems to be that if the party calling for the books inspects them so far as to become acquainted with their contents, they are thereby made competent evidence, and may be used by both parties. 1 Greenlf. Ev. § 563. In the case of *Calvert* v. *Fowler*, 7 C. & P. 386, the rule was applied in the case of an account book where the party calling for it had taken the book and turned over several pages, it was held that in so doing he had made the book evidence in the case. It is, however, said by Mr. Greenleaf, in his treatise on evidence, that in the American courts the law is not entirely settled on this point. In New York the rule was questioned by Spencer, J., in the case of *Kenny* v. *Clarkson*, 1 Johns. 385, 395, and by Thompson, J., in the case of *Lawrence* v. *Van Horne*, 1 Caines, 276, 286. In *Withers* v. *Gillespy*, 7 S. & R. 10, it was held where books are produced on notice and entries are read in evidence by the party calling for them, the party producing them may read other entries necessarily connected with the former entries. The only conflict in the cases, or real doubt that seems to have arisen in the reported cases, is, whether the mere act of inspecting and perusing the books by the party calling for them makes them evidence. The result of the examination of the cases seems to be, first, That all the authorities agree that mere calling for the books is not enough to make them evidence; second, That whether calling for the books of the opposite party and inspecting them, and doing nothing more, makes the book evidence, is a *mooted point*; third, That the books when produced upon notice, if inspected by the party calling for them, and actually used as evidence by him, are thereby made evidence for the other party. 3 Phill. Ev. 4th Am. Ed. 1191; *Commonwealth* v. *Davidson*, 1 Cushing, 45.

in evidence by the party calling for its production. Every material alteration appearing on the face of a written instrument renders it suspicious, and devolves upon the party offering such instrument in evidence the burthen of explaining such alteration. A party who receives a paper interlined in a material part or otherwise altered should see that the interlineation or alteration is noted in the attestation, otherwise he must assume the responsibility of explaining it afterwards. Where the alteration is regularly noted in the attestation clause it sufficiently accounts for the interlineation or alteration, and the instrument is relieved from suspicion.[1]

The law must presume that the interlineation or alteration

[1] The rule is well settled in England and in many of the courts of this country that it is incumbent upon the party offering in evidence an instrument that appears to have been altered to explain such alteration, and that in the absence of all evidence either from the appearance of the instrument itself for otherwise, to show when the alteration was made; it must be presumed to have been subsequent to the execution and delivery of the instrument. 11 N. H. 395; 13 do. 386; 5 Bing. 183; 2 Manning & Granger, 909; 2 Harrington, 396; 22 Wendell, 393; 2 Kelly, 128; 1 Green. Ev. § 564. Such we believe to be the true rule. The case of *Knight* v. *Clements*, 8 Adol. & Ellis, 215, goes still further, for in that case it was held that the alteration was not sufficiently explained by the appearance of the instrument alone, upon the inspection of which the jury had found that the alteration was made at the time of execution, but that some other proof *dehors* the writing was necessary. We are not prepared to go that far; we think the alteration may be frequently sufficiently explained by the inspection of the instrument itself. *Walters* v. *Short*, 5 Ill. 258.

See, also, 2 Thomas Coke, 232, marginal and 188 top paging, 10 S. & R. 64, 170; 1 Tomlin's Law Dic. 524; Bour. Law Dic. 533; 2 Black. Com. 308; Bull. N. P. 268; 2 Starkie's Ev. 272; N. F. ibid. 273, and N. Y. 1 Leigh's N. P. 657; *Humphreys* v. *Guillon*, 13 New H. 385; *Tedlie* v. *Dill*, 2 Kelly, 128, 133; *Millicken* v. *Beauchamp*, 2 Mill Law Rep. 290, cited in 2 Phill. Ev. 6 Cowen & Hill's notes, 17; *Jackson* v. *Osborne*, 2 Wendell, 555; *Herrick* v. *Malen*, 22 Wendell, 388; *Hill* v. *Barnes*, 11 New Hamp. 395; *Bowers* v. *Jewell*, 2 New Hamp. 543; *Johnson* v. *Duke of Marlborough*, 3 Eng. Com. Law Rep. 360; *Bishop* v. *Chambers*, 14 do. 207; *Hinman* v. *Dickinson*, 15 do. 409; *Taylor* v. *Moseley*, 25 do. 393; *Deshrow* v. *Weatherby*, ibid. 636; *Knight* v. *Clements*, 35 do. 377; *Clifford* v. *Parker*, 40 do. 687; *Prevost* v. *Graty*, 1 Peters C. C. R. 364; *Headman* v. *Bratten*, 2 Harrington, 396; *Davis* v. *Jenney*, 1 Metc. 221; *Gillett* v. *Sweat*, 1 Gilm. 475; *Morris's Lessee* v. *Vanderen*, 1 Dall. 67; *Newell* v. *Maybury*, 3 Leigh, 350; *Mills* v. *Starr*, 2 Bailey, 359; *Railroad Bank* v. *Lane*, 7 Howard's Mississippi Reports, 414; *Wilson* v. *Henderson*, 9 Smedes & Mar. 375; *Cariss* v. *Tattersall*, 40 E. C. L. R. 677; *Hodge* v. *Gilman et al.* 20 Ill. 441.

was made either before or after the instrument was executed; and, if the latter, no man would be safe in signing any paper, no matter how fairly drafted, for the holder having it in his possession and under his control could interline or alter it at pleasure, and then call upon the maker to show that the alterations were made after its execution, which, if the alterations were made with the same hand that wrote the body of the instrument, it would in most cases be impossible for him to do. This presumption, however, arising, that the instrument was altered after its execution, is capable of being explained by the appearance of the instrument itself. Thus, if it appears that the ink and the handwriting of the body of the instrument are the same, and that the instrument is not in the handwriting of the party claiming the benefit of it, or if it appear that the alteration is against the interest of the party deriving title under it, or if it appear that the alteration instead of increasing the liability of the maker, lessens it, these or like circumstances are sufficient to change the burthen of proof. Some of the courts, however, have held that inasmuch as fraud is never to be presumed, if no particular circumstances of suspicion attaches to an altered instrument, the alteration is to be presumed innocent or made prior to its execution.[1]

The rule as stated by Mr. Greenleaf is, that "if any ground of suspicion is apparent on the face of the instrument, the law presumes nothing, but leaves the question of the time when it was done as well as the person by whom it was done, and the intent with which the alteration was made, as a matter of fact to be ultimately found by the jury upon proof to be adduced by

[1] The law upon this subject is, that if any ground of suspicion is apparent on the face of the instrument, the law presumes nothing, but leaves the question of the time when it was done, as well as that of the person by whom it was done, and the intent with which the alteration was made, as matters of fact to be found by the jury. 1 Green. Ev. 599, § 564; *Vanhorn* v. *Dorrance*, 2 Dallas, 304; *Jackson* v. *Osborne*, 2 Wendell, 255; 2 Starkie's R. 278; 4 N. Hamp. 171; 11 Conn. 531; *Ross* v. *Gould*, 5 Greenl. 204. So if, upon the production of an instrument in court, it appears to have have been altered, it is incumbent on the party offering it in evidence to explain this appearance. Every such alteration detracts from the credit of the instrument, and renders it suspicious, and this suspicion the party producing it must remove. *Gillett et al.* v. *Sweat*, 1 Gilm. 489.

the party offering the instrument in evidence." But this conflict of authority may to some extent be harmonized when we come to examine the cases in which the question of alteration has arisen. For it is said that an exception to this rule of the presumption of innocence (which courts have not always been particular to notice), seems to have been recognized in the case of negotiable paper, it having been held that the party producing and claiming under the paper is bound to examine every apparent and material alteration, the operation of which would be in his favor.[1] In some of the States the rule of the common law requiring proof of the execution of written instruments where the instrument has been declared on has been changed by statute, and the party declaring upon the instrument is not required to prove its execution unless its genuineness is denied on oath, and where no oath has been made denying the genuineness of the signature the presumption that the instrument has been altered since its execution is destroyed. It is for the court to determine whether the alteration apparent upon the face of the instrument is so far accounted for as to permit the instrument to be read in evidence and submitted to the jury, who are the ultimate judges of the facts.[2] The effect of the alteration of an instrument in a material part is to destroy the instrument and thereby render it void. An immaterial alteration, however, of an instrument which does not affect its legality, does not destroy the instrument. A distinction is taken between the alteration and spoliation of an instrument as to the legal consequences. An alteration may be defined to be an act done in changing the instrument by which its meaning or language is altered so as to change its legal effect. If what is written on or erased from the instrument has no tendency to produce this result the instrument is not rendered void. The alteration of an instrument by a stranger without the knowledge or consent of the party interested is a mere spoliation, and does not change its legal operations so long as the original instrument is traceable. If, by the wrongful act of a third person, a mere stranger, the instrument is mutilated or defaced so that its identity is gone, the law regards the alteration so far as the rights of

[1] *Taylor* v. *Moseley*, 6 C. & P. 273; *Walters* v. *Short*, 5 Gilm. 252.
[2] *Tilton* v. *The Cinton Ins. Co.* 7 Bar. 564; *Ross* v. *Gould*, 5 Greenl. 204.

the parties are concerned as an accident, and under such circumstances, secondary evidence is admissible to prove the character of the instrument before the alteration was made.[1]

Alterations made by strangers are supposed, in contemplation of law, to be made without the consent of the party, and the burthen is upon the party alleging the alteration and seeking to avoid the instrument to show consent. Where an instrument has been executed in blank, and delivered to a third party or to the opposite party, and the blank has been filled by the party to whom the instrument was delivered in accordance with the intention of the party, the instrument has been held valid. A dis-

[1] The ancient doctrine, that an alteration or spoliation of a deed by a stranger, or by accident or mistake, without the privity or consent of the party interested, destroys it, has been materially modified, if not substantially exploded, by modern decisions. *Henfree* v. *Bromley*, 6 East, 309; *Master* v. *Miller*, 4 T. R. 339, per Buller, J.; 3 T. R. 151, 153, note. The second resolution in Piggot's case (11 Coke, 27) is, "That when any deed is altered in a point material by the plaintiff himself or by any stranger without the privity of the obligee, be it by interlineation, addition, erasion, or by drawing a pen through a line or through the midst of any material word, the deed thereby becomes void." In Whelpdale's case (5 Coke, 119) it is said, "That in all cases where the bond was once the deed of the defendant, and afterwards, before the action was brought, becomes no deed, either by rasure or addition or other alteration of the deed, or by breaking off the seal, the defendant may safely plead *non est factum;* for without question, at the time of the plea, which is in the present tense, it was not his deed." And the case of one Hawood is there mentioned, in which, in an action of debt on bond, he had pleaded *non est factum*, and before the day of appearance of the inquest (or trial), by the negligence of the clerk in whose custody it was, rats did eat the label by which the seal was fixed, the justices charged the jury that if they should find that it was the deed of the defendant at the time of plea pleaded, they should give a special verdict; which was done, and the plaintiff recovered. Dy. 59, a, S. C. and notes; *id.* 112, a. Lord Kenyon, in *Reed* v. *Brookman*, says that which was supposed to be the old law was founded upon a mistake, and that the law of the country has, in this respect, in modern times, been better adapted to general convenience. If a deed may be rendered available to a party notwithstanding its total destruction, upon what principle can he be deprived of the benefit of it when it has suffered a partial injury either from accident or by the act of a stranger over which he had no control? Lord Kenyon, in *Master* v. *Miller*, 4 T. R. 329–30, seems to admit that an alteration in a deed by accident would not destroy it. In *Henfree* v. *Bromley*, 6 East, 309, Lord Ellenborough expressed a decided opinion on this point. The question there was, whether an award was void in consequence of an alteration made by the umpire in the amount awarded after he signed the award and delivered it to his attorney for the purpose of being delivered to the parties. The alteration consisted in

tinction, however, has been made by some of the cases between an oral agreement and an instrument under seal. Accordingly, it has been held that an instrument under seal, such as a deed, not being completed when delivered by the maker, but filled up by a stranger in the absence of the party who executed it, and not authorized by an instrument under seal, was inoperative and void. This distinction, however, is not always observed. A power of attorney under seal to transfer stock, bail bonds, appeal bonds, and the like instruments, have been held good though executed in blank and afterwards filled up by parol authority.[1] Yet it has been held that such blank can not be filled up so as to

running his pen through the £57, the amount originally awarded, and inserting the sum of £66, leaving the £57, however, still legible. It was contended by Erskine and Pooley, that the alteration in the award vitiated it altogether; and they referred to the second resolution in Piggot's case (11 Coke, 27) in support of their argument. But Lord Ellenborough, for the whole Court, said: "I consider the alteration of the award by the umpire, after his authority was at an end the same as if it had been made by a stranger or mere spoliator, and I still read it, with the eyes of the law, as if it were an award for £57—such as it originally was. If the alteration had been made by a person who was interested in the award, I should have felt myself pressed by the objection; but I can no more consider this as avoiding the instrument than if it had been obliterated or canceled by accident." *Rees* v. *Overbaugh*, 6 Cowen, 748.

[1] The plaintiff, together with a surety, executed a bond and delivered it to Robinson as their agent, with verbal directions and authority to submit it to Mr. Helme, and if he thought any alteration or addition necessary, to make them. It falls within the principle of the cases in which it has been held, that a bond executed in blank as to a material part, with parol authority to fill up the blank and deliver it, is good. In *Texira* v. *Evans*, 1 Anst. 228, cited by Wilson, J., a bond executed in blank as to obligee and amount, was delivered to an agent to raise money upon, with parol authority to fill up the blanks with the name of the lender and the sum, and was held good. So in *ex parte* Decker, 6 Cowen 60; *ex parte* Kerwin, Cowen, 118, appeal bonds executed in blank, with parol authority to an agent to fill them up and deliver the bonds, were held valid. *Knapp* v. *Maltby*, 13 Wend. 434.

The real and only point before us, then, is whether the filling up of the blank left in the bill of sale for the certificate of registry rendered the bill of sale void. The jury have found that the blank was filled up by the consent of Evans, the vendor. The testimony upon which that finding was grounded is not stated in the case; we are, therefore, to take it for granted that that fact is not controverted, and are, of course, relieved from any inquiry how far such an act could have been permitted without the consent of the vendor. Neither is it requisite to examine whether the filling up of this blank made a material alteration in the deed, because I think it can be maintained that a deed may be altered in a

give to the writing a legal effect contrary to the intention of the parties. In this respect it is different from an indorsement in blank upon a negotiable note, or a blank signature or acceptance which is so made as to enable the person in whose hands it is placed to impose upon the community by an apparent right to the instrument written over the signature as the legal owner of a negotiable security where such negotiable instrument has been transferred before due to a *bona fide* holder. An instrument attested by subscribing witnesses must be proved by such witnesses, or one of them, if within the jurisdiction of the court. Various reasons are assigned for this rule, the principal of which is, that the witnesses' attestation constitutes a part of the *res gestæ*, and if they are called in addition to the proof of the execution of the instrument, they may be able to state the time of the execution and other material facts attending the transaction which may not be within the knowledge of the other witnesses, and for the further reason that such witnesses are the persons selected and agreed on by the parties as the witnesses of their act in making the instrument, with the attending circumstances.[1] Even proof

material part with the consent of both parties. It is difficult to perceive any objection to this, since the temptations to abuse and fraud, which would be felt if such alteration were allowed by one party only, do not exist. In 2 Roll. Abr. 29, pl. 5, it is, however, stated that if a material alteration be made in a deed by the obligor, with the consent of the obligee, it is still void; and for this, Xacmau's case in the C. P. is cited. But when this case was cited in *Master* v. *Miller*, 4 Term R. 322, Lord Kenyon said that there had been contrary decisions since; and in *Markham* v. *Gomaston*, as reported in Moore, 547, a subsequent and contrary decision is stated to have been made in K. B. A bond was given containing the recital of a former bond or recognizance, against which the one in question was taken by way of indemnity. The former bond was recited with a blank for the Christian name and addition of the obligee, and this blank was afterwards filled up. In a suit upon the bond of indemnity, this matter was specially pleaded, and the plaintiff replied that the blank was filled up with the consent of the obligor, and upon demurrer judgment was given for the plaintiff. That is a case very analogous, and, indeed, in point; for it will be admitted tha the blanks in that case were material. *Woolley* v. *Constant*, 4 John. 58.

[1] The question here is, whether proof of the acknowledgment by the defendants, out of court and before some private person, that they had executed the bond, is good proof of its execution upon the issue of *non est factum*, without producing the subscribing witness or in any manner accounting for his absence. Here we are certainly concluded by an ancient and uniform rule, that when a defendant has not acknowledged his deed before a competent public officer, or

of the confession or acknowledgment of the party that he executed the instrument, will not be received as a substitute for the testimony of the subscribing witness. Lord Kenyon refused to receive the acknowledgment of the person who executed the deed though made in his presence in court, and on trial where the deed was to be used.[1] To what extent the law changing the rule of the common law and thereby rendering parties competent as witnesses will change or modify the rule in regard to subscribing witnesses remains yet to be determined. We can perceive no reason why a party to the instrument would not be as competent to prove the execution of the instrument, with all its attendant circumstances, as well as a subscribing witness. The rule grew up out of the necessities of the case when parties to the record, or parties in interest, were incompetent as witnesses. Opposed, however, to this suggestion, are two important cases, in which it was held that if the execution of a deed can not be proved by one of the parties to it, the subscribing witness must be called.[2]

A subscribing witness is one who was present when the instrument was executed, and who, at the time, subscribed his name as a witness of the execution. The witness need not be present at the moment of the execution; if he is called in by the parties immediately afterwards, and informed that it is their deed or agreement, and requested to subscribe his name as a

has not expressly agreed to admit it in evidence upon the trial, but has put himself upon his plea of *non est factum*, the plaintiff must produce the subscribing witnesses and give the defendant the benefit of an investigation of the circumstances attending the execution of the deed. *Fox* v. *Reil*, 3 John. 477, 478.

See, also, *Cussans* v. *Skinner*, 11 M. & W. 168; *Hollenback* v. *Fleming*, 6 Hill, N. Y. 303; *Abbott* v. *Plumbe*, 1 Doug. 216; 7 T. R. 267; 2 East, 187; *Rex* v. *Harrington*, 4 M. & S. 353; *Henry* v. *Bishop*, 2 Wend. 575.

[1] *Johnson* v. *Mason*, 1 Esp. R. 89.

[2] The defendant was not entitled to prove his deed by the grantee without accounting for the subscribing witness. The grantee had the strongest interest in the question put, and it showed the danger of departing from the general rule as to the proof of deeds. *Willoughby* v. *Carleton*, 9 John. 137.

Lord Ellenborough said, in the case of *Call* v. *Dunning*, 4 East, 54, that "this case falls within the common rule. The answer of the defendant in Chancery, admitting the execution of his bond, to which there was a subscribing witness, can not be more than secondary evidence; and I did not reject it as being inadmissible in any event, but because the plaintiff had not laid the foundation for letting it in by showing that he had made inquiry after the subscribing witness and had not been able, by due diligence, to procure any account of him."

witness, that will be enough; the execution by the parties and by the subscribing witness are then considered as a part of the same transaction.[1] But if the witness were present at the execution, and if he did not subscribe the instrument at the time, but did it afterwards, without the request of the parties, he is not an attesting witness, and the instrument may be proved the same as though there was no attesting witness; so, also, when his name is signed by another and not by himself.

To the rule requiring instruments attested by subscribing witnesses to be proved by the subscribing witnesses, there are numerous exceptions that are as firmly established as the rule itself; the first of which is, that where the instrument is not directly in issue, but comes in incidentally in the course of the trial or investigation, the subscribing witness need not be called, but the execution of the instrument may be proved by any competent witness. So where the instrument attested is an official bond required by law to be taken by a public officer for the benefit of all persons concerned and to be preserved for their protection and benefit, and the due execution of which must be passed upon and approved by such officer, under such circumstances the instrument is said to be of such a high character of authenticity that *prima facie*, it proves itself.[2]

[1] *Parke* v. *Means*, 3 Esp. R. 171; 2 Bos & Pull, 217, S. C.; *Parnell* v. *Blackett*, 1 Esp. R. 97; *Lesher* v. *Levan*, 2 Dall. 96; *Grellier* v. *Neale*, Peake's Cas. 146; *Munns* v. *Dupont*, 3 Wash. C. C. Rep. 31, 42; *Wright* v. *Wakefield*, 4 Taunt. 320.

[2] In general, it may be remarked that in all the United States provision is made for the registration and enrollment of deeds of conveyance of lands, and that prior to such registration the deed must be acknowledged by the grantor before the designated magistrate; and in case of the death or refusal of the grantor, and in some other enumerated cases, the deed must be proved by witnesses either before a magistrate or in a court of record. But generally speaking, such acknowledgment is merely designed to entitle the deed to registration, and registration is, in most States, not essential to passing the title, but is only intended to give notoriety to the conveyance as a substitute for livery of seizin. And such acknowledgment is not generally received as *prima facie* evidence of the execution of the deed, unless by force of some statute or immemorial usage rendering it so; but the grantor or party to be affected by the instrument may still controvert its genuineness and validity. But where the deed falls under one of the exceptions, and has been proved *per testes*, there seem to be good reasons for proving this probate, duly authenticated, as sufficient *prima facie* proof of

A second exception to this rule is where the witness from physical or legal obstacles can not be produced. If such witness is dead, or on diligent inquiry can not be found, or is out of the jurisdiction of the court, or is a fictitious person, or the instrument is lost and the name of the subscribing witness is unknown, or if the witness is infamous, or if the witness was incapacitated from being an attesting witness at the time of signing the instrument, which fact was unknown to the party, or if the party pending the cause agrees with the adverse party to admit the execution of the instrument, and thus dispense with the necessity of calling such witness, or if the witness being called denies the execution of the instrument, or can not remember its execution, it may be established in all such cases by other competent evidence. It is said that if

the execution; and such is understood to have been the course of practice, and still is, as settled by the statutes of many of the United States.

The certificates of acknowledgment were, we think, properly received in evidence. The objections to them, if all allowed, would destroy almost entirely the utility of the statutes which declare a probate or certificate of acknowledgment indorsed by certain officers upon a deed, to be *prima facie* evidence of its execution. If their official character, their signatures, and that they acted within their territorial jurisdiction must be shown by extrinsic evidence, the party may as well, and in general perhaps with more convenience to himself, procure the common law proof. The practice is to take a certificate which appears on its face to be in conformity with the statutes, as proof of its own genuineness; it need only be produced. There is no need of extrinsic proof, such as showing by whom it was made, any more than of a notary's certificate when received under the commercial or civil law (Chitty on Bills, Am. Ed. 1839, p. 642, a; 2 Dom. tit. 1, § 1, pl. 29), or a clerk's certified rule of the court in which the cause is pending. Cowen & Hill's 1 Pill. Ev. 388. Accordingly, where the certificate describes the proper officer acting in the proper place, it is taken as proof both of his character and local jurisdiction. *Rhoades's Lessee* v. *Selin*, 4 Wash. C. C. R. 718; *Willink's Lessee* v. *Miles*, 1 Pet. C. C. R. 429; *Morris* v. *Wadsworth*, 17 Wendell, 103, 112, 113. He is like an officer authorized to take testimony *de bene esse* under various statutes. *Ruggles* v. *Bucknor*, 1 Paine's C. C. R. 358, 362. Thompson, J., there said, *prima facie* the officer is to be presumed *de facto* and *de jure*, such as he is described to be. *Thurman* v. *Cameron*, 24 Wendell, 90.

The execution of the deed from Pratt to Johnson which was admitted in evidence was sufficiently proved by the acknowledgment made before the justice of the peace, and the certificates of the recorder of the county. The certificate is full, certain, and direct. The additional proof contained in the deposition of Harlin, of the handwriting of Pratt, and the subscribing witness, Roberts, is only cumulative and fortifies the certificate of acknowledgment of the justice. *M'Connel* v. *Johnson*, 2 Scam. 528.

the witness becomes blind, that does not excuse the party from calling him; for he may be able to testify to the circumstances connected with the execution of the instrument. Where a party interested is used as an attesting witness, and continues in interest, the party using him not knowing the fact, the attestation would be treated as a nullity.[1] A third exception is allowed, as we have previously seen, when the instrument on notice is produced by the adverse party, the party producing it claiming an interest in such instrument. Thus, it was held that if the party producing the instrument on notice is one of the parties to the instrument, the custody of the paper affords high presumptive evidence that he holds it as a muniment, and *prima facie* it is sufficient proof of the execution. But the mere possession of an instrument does not dispense with the necessity which lies on the party calling for it of producing the attesting witness. Thus, in the case of an heir at law being in the possession of a will, and the devisee brings ejectment, and calls upon the heir to produce the will, it would be hard if the heir claiming against the will should be affected by its production, so as to dispense with proof of its execution. "The result appears to be," says Mr. Phillips, in his work on Evidence, "that where a party in pursuance of a notice produces an instrument to which he is a party, and under which he claims a beneficial estate, it will not be necessary that the other party, a stranger to the instrument, should call an

[1] Chief-Justice Shaw on this point says, in delivering the opinion of the Court in the case of *Amherst Bank* v. *Root et al.*, "It appears from the report that Smith was a stockholder at the time of the attestation, and so continued till the time of his decease. It is, therefore, obvious that if Smith himself were living, and within the jurisdiction of the Court he could not be examined as a witness, being incompetent on the ground of interest. (1 Starkie's Ev. 337; *Swire* v. *Bell*, 5 Term Rep. 371.) We think it follows as a necessary consequence, that proof of his handwriting is not admissible. Such evidence is in its nature secondary, being admissible only when the attesting witness is dead, or without the jurisdiction of the Court, or when he has become interested after the attestation by act of the law. In saying that if Smith had lived he could not have been called as a witness, it is proper to qualify the remark by adding that such would have been the case if his interest had continued. But he might have been qualified as a witness by an actual alienation of his shares, so that he had ceased to be interested at the time of the trial. But, even then he would not be called to prove the fact of attestation by himself, but the fact of execution by the parties." See, also, *Honeywood* v. *Peacock*, 3 Camp. 196.

attesting witness; but that in other cases the execution ought to be regularly proved by the party who offers the instrument as part of his evidence in the case. The question often arises, what degree of diligence is necessary to be made in search of the subscribing witnesses, and whether the return of an officer is sufficient when made upon a subpœna *prima facie* to admit other evidence in proof of the execution of the instrument? The rule is, that the same degree of diligence in search for the subscribing witness is required as is necessary in laying the foundation for the introduction of secondary evidence of the contents of a lost paper. There should be a strict diligence and satisfactory search. The subscribing witness, if his residence is known, should be inquired after at such place of residence, and at all other places where there may be a reasonable expectation that he may be found; and inquiry should be made of his relations, if he has any, and of others who may be supposed to be acquainted with him, so as to be able to afford any information upon such inquiry being made; answers given in reply being part of the *res gestæ* may be proved. When the execution of an instrument attested may be proved by other than the attending witnesses, it will be sufficient to prove the attestation of one of the witnesses, or in some of the States proof of the handwriting of the parties is required in addition to that of the subscribing witness, but upon this point neither the rule nor the practice is uniform." Spencer, C. J., in delivering the opinion of the Court in the case of *Jackson* v. *Le Grange*,[1] says, "I am of the opinion that the will was not well proved. Quackenbush merely proved his own signature as a witness to the execution of the will. He had lost all recollection of the facts and circumstances attending its execution. He never knew the testator, and he had not to his recollection seen him before that time. I consider it well settled, that on a trial at law, where the execution of a will comes in question, the party supporting or claiming under it is not under the necessity of calling more than one of the subscribing witnesses if he can prove the execution as that the testator signed it in the presence of the witnesses, or acknowledged his signing to them, or to each of them, and that the witnesses subscribed it

[1] 19 John. 388.

in his presence. But if the witness can not prove these requisites, the other witnesses ought to be called. If they are dead, their handwriting and the handwriting of the testator ought to be proved; and then it becomes a question of fact whether, under all the circumstances, it is to be presumed that all the requisitions of the statute have been observed. The death and signature of Jeremiah Lansing were proved, but it appeared that Matthew Wendell, the other subscribing witness, was alive and within the jurisdiction of the court. He ought to have been called, inasmuch as Quackenbush did not prove the facts essentially necessary to the valid execution of the will. If Wendell had been called he might have proved or disproved these facts. If his recollection should also have failed him, still, if he could have proved his signature, then, on proving the signature of the testator, I should be of the opinion that the will had been sufficiently proved to entitle it to be read. The law does not require impossibilities; and, therefore, where the will has been executed a long time before the trial, it is not, ordinarily, to be expected that the witnesses will be able to remember all the material facts. In this respect a will may be compared to a deed, the execution of which is denied. If the subscribing witnesses prove their signatures, though they may not be able to recollect the delivery, yet, if they declare that they never subscribed as witnesses without a due execution of a deed by the grantor or obligor, such proof would be sufficient. So, also, if the subscribing witnesses to a will are dead, the proof of their signatures and that of the testator is sufficient. *Prima facie* the law will intend a due execution." Mr. Justice Story, in the case of *Patterson* v. *Winn*,[1] says, "There appears to have been a very diligent search in all the proper places, and among all the proper persons connected with the transaction to obtain information of the existence or loss of the papers. The affidavit of Patterson explicitly denied any knowledge where they were; and declared that they were not in his possession, power, or custody. We think that according to the rules of evidence at the common law, this preliminary proof afforded a sufficient presumption of the destruction or loss of the originals to let in secondary evidence; and that it was not com-

[1] 9 Curtis, 314.

petent for the Court to exclude it by its own rule. However convenient the rule might be to regulate the general practice of the courts, we think it could not control the rights of the parties in matters of evidence admissible by the general principles of law." Mr. Chief-Justice Kent, in delivering the opinion of the Court, in the case of *Jackson ex dem. Livingstone et al.* v. *Burton*,[1] said: "The proof of the deed was *prima facie* sufficient. It was a deed of forty-four years' standing, and there was proof of the handwriting of one of the subscribing witnesses and that he was dead. If there be two or more subscribing witnesses to a deed, the calling of one to prove the deed has always been held sufficient; and when the witnesses can not be produced there is no fixed rule requiring proof to the hand of *all* the absent witnesses. The only point in the case is that the absence of Murray, the other subscribing witness, was not accounted for; but the presumption that he was not to be found, and that he was either dead or beyond sea, was under the circumstances very strange, and sufficient to let the proof go to the jury." Mr. Justice Sutherland, in delivering the opinion of the Court in the case of *Jackson* v. *Gager*,[2] said: "The general rule is, that where there are several witnesses to a deed, it may be proven by one of them. If none of them are in being, or from any other sufficient cause can not be produced, proof of the signature of one of them is sufficient.[3] But before evidence can be given of the handwriting of either of the witnesses, some account must be given of all of them; as that they are dead or beyond the jurisdiction of the court; or that upon diligent inquiry nothing can be heard of them;[4] though I admit that the rule has been, under peculiar circumstances, somewhat relaxed, as in case of an ancient deed. In *Wallis* v. *Delancy*[5] the action was brought on a bond executed at New York, and attested by two witnesses, Rivington and Moreton. After the handwriting of the obligor and of Rivington had been proved, Lord Kenyon held the proof deficient, unless some account was given of the other witness. It was then proved that there had been a man of the name of Moreton, a clerk in the store of Rivington, at New York. Lord

[1] 11 John. 63. [2] 5 Cowen, 385. [3] 1 Phill. Ev. 169.
[4] 7 T. R. 261, 262. [5] 7 T. R. 262, note c.

Kenyon held this sufficient, it being a foreign transaction. In *Cunliffe* v. *Lefton*,[1] proof of the handwriting of one of the witnesses was admitted after it had been proved that, upon diligent inquiry, no trace of the other witness could be obtained. But without such evidence the proof would clearly have been held defective." Mr. Justice Nelson, in delivering the opinion of the Court in the case of *Pelletreau* v. *Jackson*,[2] lays down a rule that is very concise and yet comprehensive, and is supported and borne out by the strictest rules of evidence; he says: "Where there is no witness to the deed, or if there is, and he denies having any knowledge of the execution, or the name of the subscribing witness is fictitious, or the witness is interested, or of infamous character, or if dead or out of the jurisdiction of the court, and after diligent inquiry no proof of his handwriting can be made, or if upon like inquiry nothing can be heard of the subscribing witness, so that he can neither be produced nor his handwriting proved; in all these cases the execution of the deed may be proved by proving the handwriting of the party, or by his admission that he executed it. And all these qualifications of the general principle as to the proof of the execution of instruments with subscribing witnesses, are in strict observance of another rule of evidence, namely, that the best of which the nature and state of the case will admit must be produced.[3] There was in this case, I am of opinion, sufficient diligence shown in the inquiry after the subscribing witness to let in the secondary evidence; that is, proof of her handwriting; but it fell short of what the Court would have required, in order to justify an entire disregard of the fact that there was a subscribing witness to the instrument in the proof of the execution of it. The same diligence should be exacted in endeavoring to prove the handwriting that is required in endeavoring to find and procure the personal attendance of the witness, at least before the third degree of evidence is admitted, to-wit, the handwriting of the party. In both these cases it should be satisfactorily proved that a reasonable, honest, and diligent inquiry has been made, without any evasion or de-

[1] 2 East, 183. [2] 11 Wend. 124.

[3] Phil. Ev. 363 n. a. 5 Esp. R. 16; note Peake's R. 23, 147; 2 East, 183; 7 T. R. 266; 1 John. Dig. 576, ix; 9 Cowen, 140.

sign to overlook the witness, or the means of proving his handwriting." In those States where proof of the handwiting of the subscribing witness is alone required to entitle the instrument to be read, some accompanying proof of the identity of the party sued, with the person who appears to have executed the instrument, is deemed requisite. But it seems that slight evidence of identity will suffice.[1]

[1] *Whitelock* v. *Musgrove*, 1 C. & M. 511; *Nelson* v. *Whiteall*, 1 B. & Ald. 19; *Warren* v. *Anderson*, 8 Scott, 384; Phil. & Am. on Ev. 661 n. (4). This subject has recently been reviewed in the cases of *Sewell* v. *Evans* and *Roden* v. *Ryde*, 4 Ad. & El. N. S. 626. In the former case, which was an action for goods sold against William Seal Evans, it was proved that the goods had been sold to a person of that name who had been a customer, and had written a letter acknowledging the receipt of the goods; but there was no other proof that this person was the defendant. In the latter case, which was against Henry Ryde as the acceptor of a bill of exchange, it appeared that a person of that name had kept cash at the bank where the bill was payable, and had drawn checks which the cashier had paid. The cashier knew the person's handwriting by the checks, and testified that the acceptance was in the same writing; but he had not paid any check for some time, and did not personally know him, and there was no other proof of his identity with the defendant. The Court in both these cases held that the evidence of identity was *prima facie* sufficient. In the latter case the learned judges gave their reasons as follows: Lord Denman, C. J., "The doubt raised here has arisen out of the case of *Whitelock* v. *Musgrove* (1 C. & M. 511; S. C. 8 Tyrwh. 541). But there the circumstances were different; the party to be fixed with liability was a marksman, and the facts of the case made some explanation necessary. But where a person in the course of the ordinary transactions of life has signed his name to such an instrument as this, I do not think there is an instance in which evidence of identity has been required except *Jones* v. *Jones* (9 M. & W. 75). There the name was proved to be very common in the country, and I do not say that evidence of this kind may not be rendered necessary by particular circumstances; as, for instance, length of time since the name was signed. But in cases where no particular circumstances tend to raise a question as to the party being the same, even identity of name is something from which an inference may be drawn. If the name were only John Smith, which is of very frequent occurrence, there might not be much ground for drawing the conclusion. But Henry Thomas Rydes are not so numerous; and from that, and from the circumstances generally, there is every reason to believe that the acceptor and the defendant are identical. The dictum of Bolland, B. (3 Tyrwh. 558), has been already answered. Lord Lyndhurst, C. B., asks (3 Tyrwh. 543) why the *onus* of proving a negative in these cases should be thrown upon the defendant? The answer is, because the proof is so easy. He might come into Court and have the witness asked whether he was the man. The supposition that the right man has been sued is reasonable on account of the danger a party would incur if he served process on the wrong party, for if he did so willfully,

Where there is no subscribing witness, the instrument may be proved by evidence of the genuineness of the signature of the maker or obligor.[1] In this connection we are brought to consider the question of comparison of handwritings; and upon this point the authorities are far from being agreed. Mr. Starkie, speaking as to the rule excluding mere comparison of handwritings, says, that "perhaps, after all, the most satisfactory reason for it is that if such comparison were allowed it would open the door to the admission of a great deal of collateral evidence which might go to a very inconvenient length; for in every case it would be necessary to go into distinct evidence to prove each specimen produced to be genuine."[2] But though the witness can not be permitted to compare the papers and give their

the Court would, no doubt, exercise their jurisdiction of punishing for a contempt. But the fraud is one which, in the majority of cases, it would not occur to any one to commit. The practice as to proof, which has constantly prevailed in cases of this kind, shows how unlikely it is that such fraud should occur. The doubt now suggested has never been raised before the late cases referred to. The observations of Lord Abinger and Alderson, B., in *Greenshields* v. *Crawford* (9 M. & W. 314) apply to this case. The transactions of the world could not go on if such an objection were to prevail. It is unfortunate that the doubt should ever have been raised, and it is best that we should sweep it away as soon as we can."

Patterson, J.: "I concur in all that has been said by my Lord; and the rule laid down in all books of evidence agrees with our present decision. The execution of a deed has always been proven by mere evidence of the subscribing witness's handwriting if he were dead. The party executing an instrument may have changed his residence; must a plaintiff show where he lived at the time of the execution and then trace him through every change of habitation until he is served with the writ? No such necessity can be imposed."

Williams, J.: "I am of the same opinion. It can not be said here there was not some evidence of identity. A man of the defendant's name had kept money at the branch bank, and this acceptance is proved to be his writing. Then, is that man the defendant? That it is a person of the same name is some evidence until another party is pointed out who might have been the acceptor. In *Jones* v. *Jones* (9 M. & W. 75), the same proof was relied upon, and Lord Abinger said, The argument of the plaintiff might be correct if the case had not introduced the existence of many Hugh Joneses in the neighborhood where the note was made. It appeared that the name, Hugh Jones, in the particular part of Wales, was so common as to hardly be a name; so that a doubt was raised on the evidence by cross-examination. That is not so here; and therefore the conclusion must be different."

[1] *Pullen* v. *Hutchinson*, 12 Shept. 249.

[2] 2 Starkie's Ev. 875, 6 Am. Ed.

opinion to the jury as the result of such comparison merely, yet the jury, under certain limitations, have been allowed to assist their judgment in this way. And in a case tried before Lord Kenyon, where there was contradictory evidence respecting the defendant's handwriting, the jury were allowed to compare bills admitted by him to be genuine.[1] In more recent English cases the doctrine is laid down thus: that the court or jury may compare the documents together when properly in evidence, and from that comparison form a judgment on the genuineness of the handwriting.[2] The doctrine excluding comparison of handwritings was recognized by the Supreme Court of the United States,[3] and it was held by that Court, that evidence by comparison of hands was not admissible when the witness gained his information, not from having seen the handwriting and knowing it to be genuine, but merely from comparison.[4] The same rule was adhered to by Chancellor Kent, who said, "It is usual for witnesses to prove handwriting from previous knowledge of the hand derived from having seen the person write, or from authentic papers received in the course of business. If the witness had no previous knowledge, he then can not be permitted to decide it in court by a mere comparison of hands." Bronson, Ch. J., in delivering the opinion of the Court in the case of *The People* v.

[1] *De Costa* v. *Pyme*, Peake's Add. Cases. 144; *Allisbrook* v. *Roach*, 1 Esp. R. 351.

[2] *Griffith* v. *Williams*, 1 Crom. & Jarv. 47.

[3] It is a general rule, that evidence by comparison of hands is not admissible where the witness has had no previous knowledge of the handwriting but is called upon to testify merely from a comparison of hands. There may be cases where, from the antiquity of the writing, it is impossible for any living witness to swear that he ever saw the party write, comparison of handwriting with documents known to be in his handwriting has been admitted. But these were extraordinary instances, arising from the necessity of the cases and the surrounding circumstances. *Strother* v. *Lucas*, 10 Curtis, 368.

[4] The rule that the genuineness of handwriting can not be proved or disproved by allowing the jury to compare it with the handwriting of the party proved or admitted to be genuine obtains in criminal as well as civil cases. The genuineness of a promissory note could not be so proved, though the matter in controversy did not amount to five dollars. Certainly, then, where the life of a human being may depend on the result, the rule of law can not be less strict. We shall not stop now to discuss the propriety or reason of this rule. It is sufficient that it is well settled and universally observed. *Jumpertz* v. *People*, 21 Ills. 408.

Spoone,[1] says: "The general rule is, that a witness must have acquired a knowledge of the party's handwriting, either by seeing him write, by corresponding with him, or in some other way, before he is qualified to speak on the subject. An exception to the rule has sometimes been made, and persons supposed to be skilled in detecting forgeries, although not acquainted with the party's handwriting, have been allowed to give their opinion on the question whether a particular instrument or signature was written in a genuine or imitated character." Private writings may be proved by a witness who has seen letters or documents purporting to be in the handwriting of the party and afterwards has personally communicated with him respecting them, or has acted upon them, the party having known and acquiesced in such acts, which is nothing more, in its nature, than comparison. The principle upon which evidence of this character is received is, that the witness has an exemplar in his mind, derived from previous knowledge founded upon belief; and he may always be interrogated as to the circumstances on which he founds his belief. The American decisions on the question of admitting writing in evidence for the sole purpose of establishing a standard of comparison of handwriting, is far from uniform. Each State is governed, in a great measure, by the decision of its own Superior Courts.[2]

[1] 1 Denio, 344.

[2] Such writings are rejected in all the States that have adopted the English rule. Among them are New York, Virginia, and North Carolina. (9 Cowen 94; 2 John. 210; 1 Denio, 343; 1 Leigh, 216; 1 Hawks, 6; 1 Iredell, R. 16). Rhode Island generally follows the English rule. (2 R. I. Rep. 319). The weight of authority in Kentucky is in favor of the English rule. (13 B. Mon. 258). In Massachusetts, Maine, and Connecticut, papers, whether relevant or irrelevant to the issue, are admitted to the jury for the purpose of comparison of the handwriting. (11 Mass. 309; 17 Pick. 490; 21 Pick. 315; 2 Greenl. 33; 9 Cowen, 55). In New Hampshire and South Carolina such papers are admitted in doubtful cases. (3 N. H. 47; 5 N. H. 367; 3 M'C. 518; 2 Nott & M'C. 401). In Pennsylvania the admission has been limited to papers conceded to be genuine. (3 Binn. 340; 10 S. & R. 110; 6 Whart. 284; 1 Penn. R. 161; 7 Penn. Law Journal, 286; 3 Greenl. Ev. § 106, note).

PART FIFTH.

PRACTICE.

CHAPTER I.

THE ATTENDANCE OF WITNESSES.

THE process by which the attendance of witnesses is enforced in our civil courts is familiarly known by the name of subpœna, or, as it is technically called, *subpœna ad testificandum.* This writ commands the witness to appear at the trial to testify to what he knows in the cause. Under the statute of 5 Elizabeth, c. 9, s. 12, a penalty by this statute of £10 was to be forfeited to the king by the party subpœnaed in case he failed to obey the mandate of the writ; but this penalty is not ordinarily enforceable in this country against the witness; but where the witness fails to attend upon the trial at the time and place fixed in the writ, he is regarded as being in contempt of the process of the court, and is liable to pay a reasonable fine, such as may be adjudged against him by the court, unless he purges the contempt by showing a reasonable excuse for his failure. By the practice, uniform in all the States, a writ of attachment of contempt on the application of the party desiring the attendance of the witness where he has been previously summoned, may be regularly obtained by order of the court commanding the sheriff to arrest such witness and bring him into court, there to be dealt with according to law. When a witness is brought into court under process of attachment for contempt, he may be examined touching the alleged contempt under oath, and if he purges the contempt by showing a reasonable excuse for his non-attendance, and also manifests a willingness to appear and testify in the cause in which he was subpœnaed, he may be discharged; otherwise he is required to pay a fine or be amerced for such reasonable amount as may be adjudged against him by the court, including the cost of his arrest and the proceeding, and may be

committed until the fine and costs are paid. In addition to the liability of a witness who has been subpœnaed and who has refused to obey the process of the court to the penalty above referred to, he is liable to the party who has been injured by his non-attendance to the extent of whatever loss such party has sustained by reason of his failure to appear and testify.[1]

The object of the law in providing the process of subpœna to compel the attendance of witnesses being simply to enforce the attendance of the witness upon the trial, it follows that a witness may attend and be sworn and examined voluntarily, though this was formerly held to be maintenance, that is, encouraging litigation. The writ of subpœna is of course in its own nature inop-

[1] Unless the contempt is purged, the witness will be fined not only the costs of the attachment, but to the full amount of the costs of the circuit incurred by the party who subpœnaed him, if the trial was put off in consequence of his non-attendance. The opinion of the Court delivered by Cowen, J., is as follows on this point: "The process of subpœna demands great and extraordinary effort on the part of the witness to obey. It commands him expressly to lay aside his business and excuse. And, while it lays him under severe obligations, it clears away obstructions in the path of obedience. The witness was always privileged from arrest on civil process in going, staying, and returning. It is not denied that serious sickness in his family, such as would prevent a prudent father or husband from leaving home on his own important business, would save him from the imputation of a contempt, and perhaps from an action. But such a case ought clearly to be shown to the court, and not left to be judicially inferred by the witness when arraigned on a criminal charge. He may exculpate himself by swearing to facts in answer to the interrogatories, provided he remains uncontradicted. But his oath must give facts as contradistinguished from his inferences. Above all, where the summons allows him full time he should struggle to get ready, as he would to go abroad on his own pressing business. If inevitably disappointed, after exhausting every reasonable expedient, he ought certainly to be excused from the payment of a penalty which presupposes some degree of neglect at least. Witnesses are the summary instruments of investigation in all our common law courts. It is not till a positive disability is apparent that their domestic examination will be received as a substitute for their actual presence. The important right of oral examination and cross-examination is at stake, and every good citizen, if he could be supposed to regard nothing beyond his own rights, should struggle for the front rank in the order of obedience. The least we can say of the case before us is, that it presents an unpleasant contrast to all this; great diligence from first to last in devising colorable excuses, without lifting a finger in preparation to go forward. The defendant must be fined, and the fine ought, at least, to be so large as to indemnify the plaintiff Kelly against the expense of the last circuit, with the cost of this proceeding." *The People* v. *Davis*, 15 Wendell, 608.

orative beyond the territorial jurisdiction of the court from whence it issues, but it often acquires a more extensive range by statute. Thus, a witness residing within a hundred miles from the place of holding a court in any district of the United States, may be compelled to attend such court by its process of subpœna, though his residence be without the district.[1] The courts of one State possess no authority to send its process of subpœna to be served upon a witness residing in another State. This is a serious detriment, especially in the administration of the criminal law, where the witness is required to confront the accused face to face. The same defect exists in the authority of the federal court to compel the attendance of witnesses in a criminal case, where the witness is beyond the limits of the State in which the court is being held; for by the Constitution of the United States, and of nearly every State in the Union on indictments for treason or felony, the depositions of absent witnesses are not receivable in evidence.[2] There is no authority conferred upon the

[1] Act of March 2, 1793.

[2] It is generally agreed that depositions taken in pursuance of these statutes may, when the witness is dead, and in some other cases, be read in evidence on the trial. The statutes do not (that is, the statutes of New York) provide that depositions shall be evidence; but they are admitted on the ground that they have been taken in the course of a judicial proceeding expressly authorized by law, when the defendant was present and had the right of cross-examination. It is sometimes said in the books that the deposition is admitted because it is not extra-judicial. But that is only a part of the true reason, and is calculated to mislead. Going upon that reason alone, the original complaint on oath before the magistrate on applying for the warrant would be admissible evidence against the defendant, although he had not then been brought into Court. That is a judicial proceeding; and yet I am not aware that the original complaint was ever received in evidence against the defendant. The contrary was expressly adjudged in the *State* v. *Hill*, 2 Hill's Law Rep. S. C. 609. The deposition must not only be taken in a judicial proceeding, but it must be taken when the defendant is present and has the opportunity to cross-examine the witness, otherwise it will not be received.

It is said that depositions taken by the coroner on holding an inquest are evidence, although the defendant was not present when they were taken. This doctrine has been gravely questioned, and I am strongly inclined to the opinion that it can not be maintained. The great principle that the accuser and the accused must be brought face to face to face, and that the latter shall have the opportunity to cross-examine, can never be departed from with safety. Neither life nor liberty should ever be put in peril by listening to *ex parte* depositions. It is better that the guilty should sometimes go free, than that the innocent

Church, upon a Church trial or investigation, to compel or enforce the attendance of witnesses. The Church, as we have previously seen, is only a voluntary organization, clothed with such authority over its own membership as is conferred by the Discipline. The law simply recognizes its existence so far as to confer upon it certain rights and privileges, but giving it no authority to hold courts or enforce the attendance of witnesses. The authority to hold judicial investigations in the Church is not conferred upon it by law, but is inherent in it as a voluntary organization, for its own protection, and the preservation of its purity. Hence the witnesses attend and give their testimony voluntarily without oath, or without the sanctions of the law, any further than such sanction may be implied. If, however, a member of the Church, duly notified of a Church trial or investigation was to refuse to attend and testify, the Church has authority to treat such member precisely as courts of law treat a witness who refuses to obey its process. The Church may deal with such a member canonically, as for a contempt of Church authority, and may reprehend him; or where the witness is guilty of contumacy, and stands in willful contempt and disobedience to the lawful request of the Church, he may be arraigned, tried, and expelled, which would be nothing but justice and right, where such a one should be so willful and disregardful of the well-being of the Church.

The Discipline provides, in case of a trial or investigation before a Church tribunal, that the witnesses, whether members of the Church or not, shall be competent to give evidence upon such trial or investigation; and where the witness is absent, and it is not practicable for him to attend, his testimony may be taken in the form of a deposition before the preacher in charge,

should be subject to such an ordeal. 2 Stark. Ev. 489–493; 2 Russ. on Crime, 661; Roscoe's Cr. Ev. 53, 54; *The People* v. *Restell*, 3 Hill, 296, 297.

By section six of the amendments to the Constitution of the United State it is provided "That in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." See Constitution of U. S. sixth amendment.

or before a preacher appointed by the presiding elder of the district within which such witness resides. Before, however, this can be done, it is necessary that regular charges and specifications should be made out, and the accused served with a copy thereof, so as to make the cause *lis pendens* or pending; for until proceedings have been commenced, and the accused has been notified thereof, so as to make him amenable to the jurisdiction of the Church tribunal before which the proceedings are to take place, neither the preacher in charge nor a preacher appointed by the presiding elder of the district has any authority to take such deposition; and if the same is taken without a substantial compliance with the requirements of the Discipline, it may, on the motion of the opposing party, be suppressed. Before taking a deposition to be used in a Church trial, a notice must be given to the adverse party of the time and place of taking such testimony, so that such adverse party may have a full opportunity of appearing and cross-examining the witness or witnesses. The notice required by the Discipline should be in writing, and should name the witness or witnesses whose testimony is to be taken. By the common law, all witnesses were required to give their testimony in open court, but as the commercial interest of the nations expanded and man became more migratory, the rule was found to be impracticable, and the common law being elastic, was so extended as to authorize the parties in civil causes to take the testimony of witnesses by deposition before officers authorized by law or before commissioners appointed by a commission called a *dedimus potestatem.* In taking a deposition, the officer or preacher has no authority to decide any preliminary question. If a question is objected to, the person authorized to take the deposition should note the objection and reduce the question and answer to writing in the deposition, leaving its decision to the court or presiding officer before whom the trial is to take place.[1]

[1] In the case of *Ault* v. *Rawson*, 14 Ills. 484, it was held, that it was competent to prove a release of a witness's interest on his *voir dire.* In the case of *Goodrich* v. *Hanson and Pearson*, 33 Ills. 509, the Court say no reason is perceived why the same thing may not be done when the question arises on his examination in chief. When the deposition was taken the defendants in error were present, but they made no objection on the ground of interest. The question was asked by the opposite party, and the defendants made no objection to

When a deposition has been taken either by the plaintiff or the defendant, and placed upon the files of the court, it may be read by either party. The party taking the deposition, where it is offered to be read by the opposite party, can not object that the other party had no notice of the taking of the deposition; but he may object to the reading of the deposition, provided it is not duly authenticated, or where the certificate of the officer or preacher is not in compliance with the requirements of the statute or of the usages of the Church.[1] It is not necessary that the deposition should be reduced to writing by the preacher in charge or by the preacher appointed by the presiding elder, but any competent person may reduce the same to writing, provided that the deposition is taken in the presence of such preacher and duly certified or authenticated by him. It must appear expressly, however, on the face of the deposition, that it was taken before the preacher authorized to take the same, and reduced to writing in his presence. The certifi-

its being answered. By failing to object at the time when the opposite party could have had the opportunity of obviating the objection, they waived the right to raise the question in the Circuit Court. To permit the question to be raised on the trial would be to give an unfair advantage to the party resisting the introduction of the evidence. To have been available, the objection should have been made and noted when the deposition was taken. Even if this witness had been incompetent on the account of his interest, the objection comes too late when made in the Circuit Court for the first time. It is not material to determine whether the questions were leading, as no such objection was noted when the questions were propounded to the witness. If the objection had then been made, it would have afforded the opposite party the opportunity of removing the objection by reconstructing the interrogatory. A party has no right to lie by and permit his adversary to take evidence without objection, and when it is offered to be read then, for the first time, to raise mere technical objections calculated to produce costs and delay. Such a practice would not tend in the slightest degree to promote justice. If the witness might be led in giving his evidence, it is no hardship to require the opposite party to object at the time to the mode of examination adopted. If, however, the party against whom the deposition is intended to be used is not present when it is taken, the rule would not apply, but only in cases where he is present and has the opportunity of having the objection noted.

[1] The defendant is not at liberty to except to his own depositions because he does not produce proof of his having given notice to the plaintiff. The admission of notice by the plaintiff is certainly sufficient, if notice to him was necessary, to enable him to use the defendant's deposition. *Yeaton* v. *Fry*, 2 Curtis, 288.

cate is good evidence, if not conclusive evidence, that the requirements of the statute or of the canons of the Church in the taking of such deposition have been substantially complied with.

Formal objections to a deposition, or to the authentication, or to the incompetency of the witness for any cause, should be made on a motion to suppress the deposition before the commencement of the trial or investigation; for it is too late, on the hearing, to raise the objection. The rule has been long settled, that objections that can be obviated by release or by the retaking of the deposition must be regularly made before the commencement of the trial or investigation;[1] but statements in a deposition which are not legitimate evidence, like hearsay, may be objected to on the trial; but those which are objectionable merely because secondary evidence, should be excepted to before the trial.[2]

We have been considering the taking of depositions on oral interrogatories, in pursuance of notice given by one party to the other. Such notice should be given a reasonable time prior to the taking of the deposition, so as to enable the opposite party to be in attendance and cross-examine the witness. Where a party gives notice of the taking of several depositions in different places on the same day, so that the opposite party can not be present at all the places to cross-examine all the witnesses, he

[1] In *Frink* v. *M'Creery*, 4 Gilm. 577, the Court said: "It is a well established and universal rule on the circuit, that all exceptions to depositions which go to their form or to the incompetency of the witnesses, must be made before the cause is called for trial and submitted to the jury." So in the case of *Webb et al.* v. *The Alton, etc.*, 5 Gilm. 225, the Court said: "If the witness was disqualified on the score of interest, the objection should have been taken in the court below by a direct application to exclude the deposition. A party is not permitted to remain silent while the cause is progressing and then raise such objection at the hearing or in the appellate court. Such a practice would occasion much delay and inconvenience, and often operate as a fatal surprise to the adverse party." *Corgan* v. *Anderson*, 30 Ills. 95; *Gregory* v. *Dodge*, 14 Wendell, 593; *Sheldon* v. *Wood*, 2 Bos. 267; S. C. 24 N. Y. 607.

[2] It is the well settled practice in all the courts of this State to move to suppress depositions, especially those of non-resident witnesses, after leave has been obtained to open them, before the trial is entered upon. The grounds of the motion are also to be specifically stated, so that the defects, if any exist, may be supplied if possible. As a general rule, the court will notice only such objections as are specifically made. If objections are not made before the trial, they can not, usually, be made afterwards, unless they are such as can be obviated. *Corgan et al.* v. *Anderson*, 30 Ills. 97.

may select which place he will attend, and the other depositions will be suppressed. What is a reasonable notice can not be determined from the analogies of the law, for it varies in the different States, and is usually regulated by statute. The safest rule that can be adopted is probably this, that the statutory notice fixed in the State in which the investigation or trial takes place may be adopted. If the parties appear and cross-examine the witness, they can not afterwards object to the sufficiency of the notice; even if they had no previous notice whatever, their appearance and cross-examination before the person taking the deposition is a waiver of notice, and the party should not be permitted, either expressly or impliedly, to waive a right and afterwards take advantage of such waiver.

Besides the taking of depositions upon oral interrogatories, as contemplated by ¶ 228 of the Discipline, the parties may, by agreement, take them by written interrogatories; but where a deposition is taken upon written interrogatories, each interrogatory should be written out at length, and the answer thereto written directly under such interrogatory; and the person taking such deposition upon written interrogatories should be careful to have the same clearly and distinctly answered, for there is not the same opportunity of obtaining the testimony of the witness upon written interrogatories as there is upon oral, unless this rule is carefully observed. The witness, where his testimony is taken upon written interrogatories, can not be asked by the person taking the same any additional questions which are not embraced in the interrogatories in chief or cross-interrogatories. Another rule is, that in taking depositions upon written interrogatories, full and complete answers should be given to all the interrogatories, whether in chief or on cross-examination. A question sometimes arises as to whether a deposition that is incomplete is admissible in evidence. No general rule can be laid down in respect to unfinished testimony, and the authorities are not uniform. If, however, a deposition is substantially complete, and the witness is prevented by sickness or death from finishing his testimony, his deposition, it would seem on principle, ought not to be rejected, but submitted to the jury with such observations as the particular circumstances may require. But if it is not so advanced as to be substantially completed, it should be

rejected; or where the answers to the interrogatories in chief are complete, but the witness is prevented by sickness or other inevitable cause from answering the cross-interrogatories, his testimony should be rejected; for in such a case the deposition is no better than a mere *ex parte* affidavit.

A mere voluntary *ex parte* affidavit of a third person, neither a party nor a witness in the cause, is not, as a general rule, admissible as evidence. It is at most regarded as only hearsay evidence, and it differs from a deposition, properly so called, in two essential particulars: first, depositions are taken by some court or by an express authority derived therefrom, or under some statute; and, second, they are always taken upon actual notice to the adverse party if practicable. But a voluntary affidavit or deposition is sometimes admissible as a declaration; as in cases of pedigree, ancient boundaries, and the like, and in cases *in articulo mortis;* thus, where a prisoner being indicted for murder was upon trial, the deposition of the deceased, made under the following circumstances, was offered to be read in evidence on the day previous to his death; and when, as it appeared, he manifested no apprehension of dying of the wound, he deposed to the occurrence when the mortal blow was given. On the next day, being fully conscious that he was *in extremis*, the deposition was read over to him, and he said "it was as nigh as he could recollect," it was held that the deposition was admissible.[1]

Where testimony has been taken in the form of depositions, it has been made a question whether the deposition could be read by the party taking the same where the witness was present in court at the time of offering to read the deposition. The authorities upon this point are not uniform. It was held by the Supreme Court of New York, that a defendant who had procured the testimony of a witness residing abroad to be taken under a commission, is not bound, on the trial of the cause, upon the requisition of the plaintiff, to call the witness who is then in court and examine him *viva voce*, but may read his deposition as taken under the commission; the plaintiff, however, may have the witness sworn and examined, although he omitted to join in the commission.[2]

[1] *The State* v. *Furguson*, 2 Hill, 619.

[2] On the trial, the plaintiff offered to read in evidence the deposition of a witness taken in Michigan. The defendant produced the witness in court, and

A very important question arises in this connection as to whether a deposition, taken in a civil suit between the same parties, or their privies, involving the same subject matter, may be read in evidence upon a Church trial or investigation. We have seen that in regard to the admissibility of verdicts and judgments rendered in a former suit, it is generally necessary that there should be a perfect mutuality between the parties and the subject matter of inquiry; but with respect to depositions the principle is applied with more latitude of discretion, and therefore a complete mutuality is not required. It is ordinarily sufficient, if the matters in controversy were the same in both cases, and the party against whom the deposition is offered might legally cross-examine the witness. If, however, the cross-examination was necessarily more limited or restricted in the former suit in regard to the matter in controversy than in the latter, it would seem that the testimony ought to be excluded.[1] The rule, is that depositions taken in a former suit between the same parties or privies, involving the same question or subject matter, are admissible when the question again arises for judicial determination. And it is not material that the parties should be identical, or that there should be complete mutuality in respect to their relation, and to the subject matter. It is sufficient if the same matter was in issue in both cases; and those against whom the depositions were offered, or those under whom they claim the estate or right in question had opportunity of cross-examining the witness and testing the truth of their testimony.[2] Thus, it has been held that the deposition of a witness before a coroner upon an inquest as

objected to the reading of the deposition for the reason that the witness was in court, and the Court overruled the objection. The deposition having been taken in conformity of the law, was admissible in evidence, and the plaintiff could not be deprived of using it by the act of the defendant. They had an opportunity of cross-examining the witness when the deposition was taken. If they chose they could have called the witness as their own witness, and examined him generally as well as touching the matters to which he had testified in his deposition. *Fink et al.* v. *Potter*, 17 Ills. 408.

[1] The answers of a witness to interrogatories filed are competent evidence against him of the facts stated therein in another suit, although the issues in the two suits be different. *Williams* v. *Cheney et al.* 3 Gray, 215.

[2] *Wade et al.* v. *King*, 19 Ill. 308.

3 Greenleaf's Ev. §§ 326, 341, 342.

to the death of a person killed by the collision of a vessel was admissible in an action for the negligent management of one of them where the witness was shown to be beyond sea.[1] Though the general rule of law is that no evidence shall be admitted but what is or might be under the examination of both parties, yet this rule is subject to some exceptions; for where the witness on the direct interrogatories answered fully but refused to answer the cross interrogatories, the party producing the witness will not be deprived by reason of his refusal of his testimony. The other party might have obtained an answer to his cross-interrogatories by application to the court or officer, taking his deposition; such court or officer would have compelled him to answer unless the matter sought to be elicited was privileged.

Depositions as well as judgments and verdicts which relate to pedigree, custom, or prescription, are, as we have already shown, admissible in evidence even against strangers; for as the declarations of persons deceased would be admissible in such cases *a priori*, their declarations on oath are admissible.[2] From analogy we conclude that depositions taken in a cause pending in our civil courts might be read in evidence upon a Church trial or investigation, subject to the limitations before prescribed; but the converse of this proposition is not true. A deposition taken before an ecclesiastical court or by its authority under the canons of the Church, can not be read in evidence in our civil courts;[3] for one of the essential elements as a test of its admissibility is wanting, namely, the sanctions of the oath. But such deposition, while it would not be admissible as between other parties in a civil suit, might be read in evidence by the adverse party in a suit against the witness as a simple declaration or admission of the witness.

[1] *Sills* v. *Brown*, 9 C. &. P. 601–603; *Rex* v. *Eriswell*, 3 Term R. 707, 712, 721.

[2] Bull *Nisi Prius*, 339, 340.

[3] Depositions, however, are sometimes introduced between other parties for the purpose of showing that a witness sworn has on a former occasion given a different account of the same matter, in order to discredit his testimony; and in such case, if one party reads part of the deposition in order to show that the witness swore differently from what he now swears, the other may read the whole to show his consistency. *Harrison* v. *Rowan*, 3 Wash. C. C. Rep. 580.

See *Temperly* v. *Scott*, 5 Car. & Payne, 341.

CHAPTER II.

THE EXAMINATION OF WITNESSES.

HAVING considered some of the elementary principles founded upon the rules of evidence, and the means of procuring the attendance of witnesses, and the admissibility of depositions, we are led now to consider the manner in which witnesses are to be examined in a Church trial or investigation, and upon this point it is difficult to lay down any exact rule; for the subject lies, to a very great extent, in the discretion of the preacher in charge or other presiding officer before whom the cause is tried. It is impracticable, from the very nature of things, and the varied circumstances surrounding each case or each investigation, to fix but few stringent and positive rules. The primary object, as we have before remarked, is to elicit the truth from the witness, and in doing so the judge or presiding officer should take into consideration the character, moral courage, intelligence, memory, bias, and other circumstances, so various as to require equal variety in the manner of interrogation and the intensity of examination allowable to attain that end. It may also be proper to remark in this connection that the circumstances of the trial must necessarily be judged of by the presiding officer and varied so as to meet the variant exigencies; and his discretion, when exercised, is not subject to be reviewed or revised by an appellate jurisdiction. Where a witness has been produced, if there is any objection to his competency, such objection should be made before his testimony in chief has been given; the opposite party, against whom the witness is introduced to testify, should not be permitted to experiment by receiving the testimony of an incompetent witness if it is favorable, or moving to exclude it from the consideration of the committee if it is opposed. When a witness is called he is first regularly examined by the party introducing him, which is called in law the direct examination; he may afterwards, and before he leaves the witness stand, be examined touching the same subject matter by the adverse party. This examination is called the cross-examination. The examination in chief and the cross-examination are conducted orally, in the presence of the

court and jury, or in the presence of the presiding officer, conference, or committee under the regulation and order of the judge, bishop, presiding officer, or preacher. The practice, in the direct examination of a witness, is not to allow counsel to put to him questions that are termed leading, that is, questions which suggest to the witness the answer which is desired to be obtained. This rule is so largely in the discretion of the presiding officer, and so difficult of application in practice, owing to the different degrees of intelligence possessed by the witness and his bias or fairness, that it can scarcely be regarded as amounting to any thing more than a simple landmark; it is also to be understood in a practical sense, for often it is necessary to approach the point which the testimony elicited is sought to establish, by direct questions; were it otherwise, the examination would often be protracted to an inconvenient length without any practical advantage to either side; therefore, counsel may lead him up to the point in issue, and may even state to him the facts which are not controverted, or which have been already established. And some of our best legal practitioners are never heard to object to a question because it is leading, though in strictness leading questions which embody facts that are material and admit of a simple affirmative or negative answer are objectionable. An objection to the form of the question is entitled to greater weight where the interrogatory assumes facts to have been proven which have not been proved, or answers to have been given different from the way in which they were given, with a view to entrapping the witness, or of leading the mind of the witness to embrace falsehood instead of truth. Except in certain cases, the witness should be examined only to matters of fact within his own knowledge; and as to such matters he should in general be distinctly and directly interrogated, leaving conclusions to be drawn from the facts proved to the jury alone, or to triers of facts. There is, however, a certain class of questions which involve skill, learning, experience, and judgment, upon which experts, or those that are particularly learned and experienced in the matter, may be examined as to their opinions and belief; and in such cases the witness is allowed to state his conclusion; but before doing so he may be examined as to his experience, learning, fitness, and qualification; and if the fact of his being

an expert is questioned, he may be cross-examined by the opposite party upon that point, before his evidence is receivable with reference to his inferences or conclusions in matters pertaining to his professional skill.[1] Under some circumstances leading questions are allowable in a direct examination. Thus, where the witness appears unwilling to give evidence, or appears to be hostile to the party producing him, or is manifestly in the interest of the other party, or where an omission in the witness's testimony is caused by the want of recollection which a suggestion may assist, or where the transaction involves numerous items or dates, or where the mind of the witness can not be directed to the subject of inquiry without a particular reference to the facts, direct questions are allowable. But in all such cases the necessity for a resort to this mode of examination should first be ascertained, and its nature judged of by the manner of the witness answering the question and his demeanor on the witness-stand. Where a witness is a party in interest and is adverse to the party calling him, leading questions, in the nature of a cross-examination, may be resorted to as a matter of right.

When a witness has been regularly sworn, he is first, as we have previously said, examined by the party calling him, after

[1] 1 Stark. Ev. 152; Goodtitle on the Demise to *Revett* v. *Braham*, 4 Term R. 497.

On the question of science or skill or trade, persons of skill in those particular departments are allowed to give their opinions in evidence; but the rule is confined to cases in which, from the very nature of the subject, facts disconnected from such opinions can not be so presented to a jury as to enable them to pass upon a question with the requisite knowledge and judgment. Thus, a physician, in many cases, can not so explain to a jury the cause of the death or other serious injury of an individual as to make the jury distinctly perceive the connection between the cause and effect. He may, therefore, express an opinion that the wound given, or the poison administered, produced the death of the deceased. But in such a case the physician must state the facts upon which his opinion is founded. (1 M'Nally, 329–335; 8 Mass. 371; 9 Mass. 325.) So ship-builders may give their opinions as to the seaworthiness of a ship from examining a survey or description of the vessel made by others when they were not present. This is evidently a matter of mechanical skill. (Peake's N. P. C. 25–43; 1 Campb. 117.) So an engineer or an engraver may give his opinion on matters belonging to his particular science or art. (4 Term, 498; 1 Phillips's Ev. 227; *Jefferson In. Co.* v. *Catheal*, 7 Wendell, 79.)

which the other party is at liberty to cross-examine him touching all the matters that he has been examined upon in chief; and then the party who first called him may re-examine. This, in strictness, closes the examination. The true office of the examination in chief is to lay before the court and jury, or the committee, as the case may be, the entire information possessed by the witness that is relevant and material; the office of cross-examination is to search, correct, supply omissions, and sift the evidence; the office of a re-examination is to put in order, set aright, repair and explain whatever has been obscured or rendered doubtful or uncertain by the cross-examination.

The power of cross-examination is given to afford one of the best securities against false evidence and incomplete or garbled statements. Great latitude is ordinarily allowable in the mode of putting the questions. The rule, however, is restricted within certain limits with respect to the relevancy of the question to the matters in controversy. Oftentimes great care and caution should be exercised in conducting a cross-examination, for it frequently happens that defects and omissions in the examination in chief are brought out and supplied upon the cross-examination. The same caution and prudence should also be made use of upon the re-examination; the examiner should always be careful, and, if possible, avoid putting the witness in a hostile attitude towards him. Much more can ordinarily be gleaned from a witness by occupying a friendly relation toward him and by giving apparent assent, for the time being, to the correctness of his statement.

We believe it to be the first duty of an examiner to treat with entire fairness and consideration a witness when he believes that such witness is testifying to the truth honestly and conscientiously, always bearing in mind that such a witness is not upon the witness stand volutarily or of his own volition, but because duty and the law compels him; if, however, there is good reason to believe that the witness is testifying recklessly or corruptly, then the best method of exposing him and of detecting the falsehood is to so examine him as to break up in his mind continuity of arrangement. Questions relevant and proper on cross-examination may be asked in such a manner as to force him to acknowledge the truth for fear of detection. Few wit-

nesses under a rigid cross-examination are capable of fabricating falsehood when they are once disconcerted and thrown out of their original groove. This, to an unscrupulous witness, is the only substantial check that can ordinarily be imposed.

Before entering upon cross-examination, a preliminary inquiry may sometimes arise as to whether the witness has so far given evidence in chief as to entitle the cross-examination to the benefit of his testimony. Thus, if a witness is called by a party for the purpose merely of producing a written instrument belonging to the party or in his possession, and is not examined with reference either to the instrument or to the circumstances connected with the holding of such instrument, he will not be subject to cross-examination.[1]

A witness can not, or at least should not, be cross-examined as to facts collateral and wholly irrelevant to the issue for the purpose of laying the foundation for the contradiction of such witness by other evidence and in such manner to discredit his testimony, and if the witness answers such collateral or irrelevant question, evidence can not afterwards be admitted to contradict his testimony on the collateral matter. It has been long settled, however, that it is not irrelevant to ask a witness whether, on some other occasion, designating in the question the time, place, and person with whom he had a conversation, he has not given a different and contrary account of the same matter. This rule is founded upon the desire of the law to deal fairly with the witness by giving him a full opportunity to recall the conversation to his memory and to explain it if it is capable of explanation.[2]

[1] In *Simpson* v. *Smith*, Natt's Summer Assizes in 1822, in an action for maliciously and without probable cause making a charge of felony before a justice against the plaintiff, in causing him to be apprehended, the plaintiff's counsel having called upon the justice to produce the information taken by him, which was accordingly produced, and was proceeding to prove the information by the justice's clerk, when it was insisted by the defendant's counsel that he should be allowed to cross-examine the justice who had produced the information. But Mr. Justice Halroyd held that this could not be done, and that the plaintiff's counsel might proceed to prove the information in the regular manner. 2 Phillips's Ev. 6 Am. from the 9 London Ed. 397.

[2] The right of counsel in cross-examining a witness to inquire into collateral

Whether a witness may be inquired of on the cross-examination as to whether he has not attempted to dissuade other witnesses examined on the other side from being present at the trial is a question upon which the courts are not uniformly agreed. It has been ruled in some cases that such an inquiry is immaterial to the issue; that if the witness answered in the negative, denying that he had made such attempt, evidence to contradict him on that point would not be admissible.[1] Certainly it might be a matter of some importance where there is a conflict of evidence to show that one of the witnesses producing such conflict had been guilty of a dishonest attempt to prevent the other from appearing at the trial; and in this view it seems strictly relevant to the matter in issue, and is essential for the discovery of truth. It has been the constant practice to allow the inquiry to be made of a witness upon cross-examination as to whether the defendant himself had attempted to induce the witness to seduce other witnesses from appearing at the trial. And in this view it would

facts with a view of discrediting him, is in the discretion of the Court under all the circumstances of the case. *Allen* v. *Bodine*, 6 Barb. 383; *Hoyt* v. *Lynch*, 2 Sand. 328.

Before a witness can be discredited by contradictory statements, the occasion of the supposed conversation must be pointed out to him with reasonable certainty, as by indicating the place, the purpose of the interview, or other circumstances likely to recall it to his memory. It is not enough to give the name of the person to whom the statement was made. *Pendleton* v. *Empire Stone Dressing Co.*, 19 N. Y. 13; S. C. 19 Law Rep. 277.

Gondolfo v. *Appleton*, 40 N. Y. In this case it was held that it was inadmissible to impeach the defendant's witness, as the plaintiff was bound by his answer on cross-examination as to what he had heard said by a third person not a party or witness, it being a collateral fact.

It is settled law that a witness can not be examined as to any distinct collateral fact for the purpose of impeaching his testimony by contradicting him. (1 Starkie's Ev. 134; 1 Phillips's Ev. 21.) But if a question relative to such a fact be put and answered, evidence can not afterwards be adduced for the purpose of contradiction. (2 Camp. 638; 2 Starkie's N. P. C. 149; 2 Gallison, 53; *Harris* v. *Wilson*, 7 Wend. 62.)

The credit of a witness may be impeached by proof that he has made either verbal or written statements out of court contrary to what he swears at the trial; provided he has been previously cross-examined as to such alleged statements, and provided that such statements are upon a point material to the question in issue. *Patchin* v. *The Astor Mutual Ins. Co.*, 3 Kernan 268; *Carpenter* v. *Ward*, 30. N. Y. 246.

[1] *Harris* v. *Tippet*, 2 Campb. 637.

seem to us to be material and very near akin to an admission by the witness of corruption, which would greatly weaken, if not destroy, his testimony. On the trial of Lord Stafford for high treason before the Lord Chancellor, proof was admitted on behalf of the prisoner that one of the witnesses for the prosecution had attempted to suborn other witnesses to give false testimony. If a witness denies having used the threat that he would be revenged upon the prisoner, it is not irrelevant to inquire, on cross-examination, whether he had not made such threat; and if the witness denies it, then to introduce evidence to contradict him. Oftentimes it becomes difficult for the court to determine whether a certain matter is so far irrelevant as to conclude the party asking the question on cross-examination by the answer of the witness. In an action on a promissory note, the execution of which was in issue, a female servant of the plaintiff, who was an attesting witness, was called by the plaintiff to prove the defendant's signature, being asked upon the cross-examination whether she did not cohabit with the plaintiff, denied the fact; the defendant then proposed to call a witness to prove the fact. This testimony was objected to, and it was insisted that the admission of the evidence would only tend to contradict the witness on a collateral matter; but the objection was overruled by Mr. Justice Coleridge, who is reported to have said, "Is it not material to the issue whether the material witness who comes to support the plaintiff's case is his kept mistress? If the question had been whether the witness had walked the streets as a common prostitute, I think that would have been collateral to the issue; and that if the witness had denied such a charge, she could not have been contradicted; but here the question is whether the witness has contracted such a relation with the plaintiff as would induce her the more readily to conspire with him to support a forgery, just in the same way as if she were the sister or daughter of the plaintiff and had denied the fact." The evidence was accordingly admitted.[1]

A witness should ordinarily be permitted only to testify to such facts as are within his own knowledge. He may, however, refresh his recollection and assist his memory by the use of writ-

[1] *Thomas* v. *David*, 7 C. & P. 350.

ten memoranda or entries in a book, or by reference to any instrument in writing, and he may be compelled, under most circumstances, to do so if the writing is present in court. It is not necessary that the writing should have been made by the witness, nor that it should be an original writing, provided after examination of it by the witness he can speak to the fact from his own independent recollection. Where a witness remembers to have seen a paper which he uses and identifies for the purpose of refreshing his memory, and examined the same while the facts were fresh in his recollection, and knew at the time of making such examination that the facts therein stated were correctly set forth in the writing, he may use the writing to refresh his memory and then testify to such fact; provided that the instrument used is admissible in evidence, but if inadmissible for any cause, it may still be referred to by the witness.[1] Where the witness does not recollect the fact upon an examination of the writing or memorandum, nor remembers to have recognized the writing as true, and where the written instrument was not made by the witness, his testimony, based upon such writing, is not admissible in evidence.

Where a party by the cross-examination of a witness obtains proof of the handwriting of a paper shown to the witness, the opposite party has a right to inspect the paper for the purpose of examining the witness. By proving a written instrument by a witness to have been properly executed, the party proving the execution will not be compelled to put the writing in evidence; if, however, counsel in cross-examining a witness puts a written paper in the witness's hand and then questions him with reference to it, and the answers are such as might have an effect upon the

[1] The book certainly could not be received in evidence as a receipt for money by the defendant, for want of a stamp. In itself, indeed, the book having been kept by the plaintiff, was no evidence at all against the defendant to charge him with the items of the account; but if there had been no signature added it can not be pretended but that if the witness had made use of it to ask the defendant whether he had had such and such articles contained in it, his admission would have been evidence against him, and the witness might afterwards have refreshed his memory at the trial by referring to the particular items to which such admission extended; then if this use might have been made of the book without the signature, the defendant, by putting his name to it, can not make it less evidence for the purpose for which it was produced. *Jacob* v. *Lindsay*, 1 East, 463.

cause, the opposite party has a right to examine the paper or writing, and to cross-examine or re-examine the witness upon it; but where such examination or cross-examination on the paper has entirely failed, the opposite party has no right to see or inspect it.

As we have previously shown, a considerable latitude of discretion is allowable in the court or presiding officer in the manner of disposing of business; still some rules of practice, and some rules governing the order of examination of witnesses, and the manner of conducting such examination should be inflexibly adhered to, as experience has demonstrated that certain rules are essential to the attainment of justice, and that certain other rules are essential aids in conducing to that end. It seems to be well settled that where a witness is called by one party the other party has only the right to cross-examine upon the facts to which the witness testified in his examination in chief. If the other party desires to avail himself of the testimony of the witness on any other point not brought out by the examination in chief, he should call him at the proper time, and make him his own witness, giving to the other party the right of a cross-examination on such evidence thus brought out in chief. If the rule were otherwise, the party calling the witness to establish ever so trifling a question would be deprived of a cross-examination as to the evidence elicited on the other side; and the party against whom the witness was first called could obtain the advantage of acquiring evidence in chief under the latitude allowed in cross-examination.[1] This rule, however, that obtains in modern practice is at variance with the English rule.[2] Probably the rule, as

[1] *Stafford* v. *Fargo*, 35 Ill. 486.

[2] It is reported to have been ruled at *nisi prius* that if a witness has been once examined by a party, the privilege of cross-examination by the opposite party continues in every stage of the cause, so that if he should call the same witness to prove his case, in reply he might ask him leading questions. In the case referred to, witness might possibly have shown a stronger bias in favor of the first party that called him, and on this account, perhaps, a greater scope was granted than is usually allowed. But it may happen, on the other hand that the party calls a witness unwillingly from necessity, knowing him at the time to be favorable to the opposite party. In such a case to allow the opposite party on calling him afterwards as his own witness to put leading questions, would be giving him an unreasonable advantage. In all cases of this description the mode

we have before stated it, is subject to this qualification, that where a witness who was incompetent to testify on the ground of interest has been called and sworn in chief, the opposite party in order to obtain the full benefit may not only cross-examine him in relation to the point which he has been called to prove, but he may, in furtherance of justice, examine him as to any matter embraced in the issue. If he is a competent witness for one purpose he is equally so for all purposes, and the party calling him and availing himself of his testimony should not be permitted to object to him on the ground of incompetency any more than he would be permitted after calling a witness to attempt to impeach his general character; he is estopped from denying his competency as well as his credibility.[1]

All testimony in chief, and especially that which tends to establish any affirmative matter in favor of the party, should as far as possible be introduced by the counsel opening; as a brief and pertinent statement of the issue and proofs, or evidence proposed by the counsel entitled to begin, is always a very essential step in the conduct of a trial: so on the other hand matters in defense or avoidance should properly be presented by the opposing counsel in the same way. Thus, in an action on an award, the plaintiff having proved the award, the defendant's counsel proposed to cross-examine the plaintiff's witnesses to certain facts which it was insisted would defeat the award; this the court prevented until the counsel had opened the case to the jury; for until this was done, it was difficult to see the relevancy of the testimony, and it often happens that testimony is relevant at one stage of a cause which appears to be irrelevant at another.[2]

On the primary examination of the witness, or, as it is generally called, his examination in chief, the party calling him is bound to ask all material questions in the first instance; for, in strictness, if he omits this, it can not be done in reply, except through the grace and favor of the court; for the rule is, that no

of proceeding must be decided by the judge in the exercise of his discretion. 2 Phillip's Ev. 401.

[1] *Morgan* v. *Bridgen*, 2 Starkie, 314; 1 Phillips Ev. 228; *Varick* v. *Jackson*, 2 Wendell, 166; *Fulton Bank* v. *Stafford*, 2 Wendell, 485.

[2] *Ellmaker* v. *Buckley*, 16 Serg. & Rawle, 72, 77, 78.

new question can ordinarily be put in reply unconnected with the subject of cross-examination, and which does not tend to explain it. If a question as to any material fact has been omitted upon the examination in chief, the usual course is to suggest the question to the court, which will exercise its discretion in putting it or in suffering it to be put to the witness.[1] This rule is exemplified in a leading case where the counsel for the crown having by the direction of the court called witnesses whose names appeared on the back of the indictment, and had them sworn to give the prisoner's counsel a chance of cross-examination, but not examining them in chief, the prisoner's counsel having accordingly cross-examined them held that after this the counsel for the crown could not examine them in chief, but only by way of re-examination, and, therefore, must confine himself to such facts as arose out of the cross-examination.[2]

The presiding officer at a Church trial has full power to allow witnesses to be recalled for re-examination in any stage of the case before it is finally disposed of. This is the established rule in both our civil and criminal courts, so that in a criminal case witnesses have been allowed after they have left the witness stand to be recalled and re-examined, even in favor of the prosecution after the close of the prisoner's defense; but where such latitude

[1] 1 Starkie's Ev. 150.

[2] *Rex* v. *Beezley*, 4 Carr. & Payne, 218.

If the court had any doubt as to what a witness did testify, it might be a proper exercise of their discretion to call the witness and re-examine him as to the fact, but if they are satisfied that he did not testify in the manner alleged by counsel, they might very properly refuse to let the witness be re-examined after he had ascertained from the charge of the court the precise form of words in which it was necessary to state an admission of the adverse party to make his evidence decisive with the jury. *Law* v. *Merrills*, 6 Wendell, 276.

A witness with the consent of the parties may be re-examined by the jury after they have retired. *Brown* v. *Cowell*, 12 John. R. 384.

The refusal to recall a witness to relate his testimony after a cause has been summed up and the jury charged is a matter of discretion appertaining to the court before whom the trial is had, with the exercise of which a court of review will not interfere. *The People* v. *Rector*, 19 Wendell, 569.

It rests in the discretion of the court before whom a trial is had, whether or not to permit the re-examination of a witness after the lapse of a day, and after the examination of other witnesses. The Supreme Court will not interfere with the exercise of such discretion, but in a very flagrant case. *The People* v. *Mather*, 4 Wendell, 231.

is extended, the prisoner's counsel should regularly be allowed to cross-examine the witness again, and if necessary introduce other and explanatory evidence.[1] The same principle is observed with reference to the conduct of the entire cause. As to the restriction on evidence in reply to the defendant's case, the rule is firmly established that the prosecution or party complaining should not be allowed to go into new and independent evidence of facts, which are not in reply to the facts brought out on the part of the defendant, but the evidence in reply should bear directly or indirectly upon the subject matter of the defense, and ought not to consist of new matter, unconnected with the defense, and not tending to controvert or disprove it. This is the general rule made for the purpose of avoiding embarrassment, confusion, and waste of time; but, as we have previously said, it rests entirely in the sound discretion of the judge or presiding officer, whether it ought to be strictly enforced or remitted as he may think best for the discovery of truth and the administration of justice.

In a prosecution for larceny the case made out on the part of the prosecution was that the goods had been stolen, and were found in the possession of the defendant. The defense was, that the daughter of the accused purchased the goods of a third person, which fact was proved by the daughter. The counsel for the crown then called the person from whom the goods should have been purchased, and attempted to prove by him that he had seen the defendant steal the goods. This evidence was objected to, because that it should have been introduced in chief, and the court sustained the objection, and confined the inquiry to whether the witness had sold the goods to the prisoner, which, if disproved, the court said would be an answer to the defense set up by the accused.[2] This was certainly carrying the rule to the very verge, as the fact of proving that the defendant stole the goods would certainly be strong proof that he did not buy them.

[1] *Rex* v *Watson*, 6 C. & P. 653.
[1] *Rex* v. *Simpson*, 2 C. & P. 415.

CHAPTER III.

IMPEACHMENT OF WITNESSES.

BEFORE proceeding to the consideration of the impeachment of a witness we will call attention to a rule recognized and firmly established in the administration of civil justice; and that is this, that a party shall not be permitted to call a witness and afterwards turn round and attack the general reputation of such witness for truth and veracity, nor, for the purpose of impeaching such witness, show that he has made statements out of court inconsistent with his testimony before the court.[1]

There are some exceptions to this rule; thus, where the witness is one which the law makes it necessary for the party to call—as in the case of a subscribing witness to a will or deed—such witness is not so far considered as the witness of the party calling him as to estop such party from calling in question his character for truth; but he may, notwithstanding the witness has been called by him, introduce evidence to impeach his general character for truth and veracity.[2] It is clear from the authorities

[1] Although it is a general rule that a party is not allowed to discredit his own witness, yet that must be understood to mean that the witness is not directly to be impeached on account of his character for truth. But the rule is by no means to extend so far that a party may not call a witness to prove a fact which a witness previously called by him has denied. A party is not obliged to receive as unimpeached truth every thing which a witness called by him may swear to. If his witness has been false or mistaken in his testimony, he may prove the truth by others. *Brown* v. *Bellows*, 4 Pick. 194.

Whitaker v. *Salisbury*, 15 Pick. 534; *Stockton* v. *Demuth*, 7 Watts, 39; *Smith* v. *Price*, 8 Watts, 447; *Winston* v. *Mosely*, 2 Lew. 137; *Fulton Bank* v. *Stafford*, 2 Wen. 483; *Friedlander* v. *London Assurance*, 4 B. & Ad. 193; *Ewer* v. *Ambros*, 3 B. & C. 746.

[2] We all think that the rule requiring the testimony of subscribing witnesses to deeds, if to be procured, can not be dispensed with. What it is to be presumed from their having subscribed as witnesses they would testify if called, can not be supplied by the statement of the other party or by evidence of the handwriting of the parties charged. *Non constat* from the indenture, produced by the defendant himself, but that the witness did see all the parties execute the same. The party who would establish a deed must lay his groundwork by the production of the subscribing witnesses, if their testimony can be obtained. If they fail to establish the execution of it, the party who thus called them by a

that a party calling a witness is not precluded from proving the truth of any particular fact by other witnesses, or by other competent testimony, even though such testimony be in direct contradiction to what such witness may have testified; and this not only where the witness was innocently mistaken, but the rule goes to the extent of admitting such evidence where it may have the effect, collaterally, of showing that the witness was unworthy of credit.

There is a conflict in the authorities on the question whether it is competent to prove that a witness whom a party has called has previously stated the facts in a manner different from the statement that he makes upon the witness stand. Some courts hold that a party should not be sacrificed by a witness who has deceived and misled him, and that he ought not to be entrapped by the arts of a designing witness, such witness, perhaps, being in the interest of the adverse party.[1] The argument on the other hand is, that to admit such evidence would be to allow the declarations of a witness to go to the jury as independent evidence. The better rule, and the one that seems to be supported by a greater weight of authority, is in favor of allowing the party to show that he has been deceived by the statement of the witness made out of court, and that the testimony takes him by surprise, or that the witness has been tampered with by the opposite party, and has been guilty of deceiving the party calling him.[2]

positive rule of law is not to be concluded by their testimony, but will be permitted to establish the fact by other evidence. It would be contrary to justice that the treachery of witnesses should exclude a party from establishing by the aid of other testimony. 1 Starkie on Ev. 147; *Whitaker* v. *Salisbury*, 15 Pick. 544.

When a party calls a witness whose general character for truth is bad, he is attempting to obtain his cause by testimony not worthy of credit. It is to some extent an imposition upon the court and jury. The law will not suppose that a party will do any such thing, but will rather hold the party calling the witness to have adopted and considered him as credible. If this were not so, it would be in the power of any party merely by putting a witness upon the stand to blacken and defame his general character for truth whenever the evidence should fall short of what was wanted. 3 Starkie on Ev. 1692.

[1] 2 Phillip's Ev. 447.

[2] In a recent case, this very point has been more fully considered, and it was held that if a witness unexpectedly gives evidence adverse to the party calling

There are several modes of impeaching the credit of a witness or witnesses called by the opposite party, and we will briefly refer to them in their order. The rule is firmly established, that the party against whom a witness is called to give testimony may examine other witnesses as to the general character of such witness for truth and veracity; and that when the general character of a witness is thus put in issue, the party interested in his testimony may call other witnesses to sustain his character. At first blush it would seem that this rule, allowing a collateral issue to be made and tried over the general character of the witness is a violation of another rule of evidence, that is, that the evidence must be relevant and tend to enlighten the issue. This departure from the rule that we have just mentioned seems to be essential to the administration of justice, for all the courts agree that if the testimony of a witness is not impeached in some of the modes known to the law, it is the duty of the jury, or of the committee, to believe it and to act upon it. And if there was no mode allowable of putting the general character of the witness in issue, the jury might as often give credence to the testimony of a man whose reputation is notoriously bad for truth as to the testimony of a witness whose reputation is good.

To impeach the credit of a witness, you can only examine as to his general character for truth, and can not go into evidence of particular facts which, if true, would impeach his character for veracity. The reason given by our elementary law writers

him, the party may ask him if he has not, on a particular occasion, made a contrary statement. And the question and answer may go to the jury with the rest of the evidence, the judge cautioning them not to infer that the facts suggested in it are true, from the question alone. In such case the party who called the witness may still go on to prove his case by other witnesses, notwithstanding their testimony relates to facts that may contradict, and thus indirectly discredit, the former witness. Thus, in an action for assault and battery, if the plaintiff's first witness testifies that the plaintiff in conversation ascribed the injury to an accident, the plaintiff may prove that in fact no such accident occurred; and if the witness denies a material fact and states that the persons connected with the plaintiff offered him money to assert the fact, the plaintiff may not only go on to prove the fact, but he may also disprove the subornation; for this latter fact has now become relevant, though no part of the main transaction, inasmuch as its truth or falsehood may fairly influence the belief of the jury as to the whole case. *Melhuish* v. *Collier*, 15 Ad. & El. 378 N. S. (See the Lochlibo, 1 English Law and Equity.)

is, that every witness may be supposed to come prepared with evidence sufficient to support his general character, but that it is not probable that he should be prepared to answer to particular facts. Hence a witness can not be asked to state any particular fact tending to impair the veracity of the witness whom he was called to impeach—as that he has known the witness to testify falsely—for if such evidence were allowable it might involve an inquiry into the character of the transaction and the entire investigation of the trial in which the false evidence was alleged to have been given; which, besides being too remote, would tend to mislead the mind of the jury or of the committee from the true issue before them to be tried. Another question in this connection is worthy of consideration; that is, how far the general character of the witness is in issue, whether the question may be asked generally of the impeaching witness, or whether it should be restricted to an inquiry into the general character of the witness for truth and veracity. Our civil courts are not agreed upon this question; some of the courts contend that it is the province of the jury to be made acquainted with the character of the witness generally, so that they may be able to place a true estimate upon the value of his testimony, and where his character is bad in one respect, it is a correct legal inference that it is bad in all; hence the maxim, *falsus in uno falsus in omnibus;* that is to say, a person that is false in one matter, is deceitful in every thing.[1]

Probably the weight of authority is in favor of restricting the inquiry of the witness to the question as to the general repu-

[1] The authorities are uniform that it is only the general reputation of a witness that can be inquired into for the purpose of impeaching his testimony; and although there is some conflict in the decisions as to whether the inquiry should be confined to the general character of the witness for truth and veracity, we think the better rule is that it should be so confined. The proper question to be put to a witness called to impeach another is whether he knows the general reputation of the person sought to be impeached among his neighbors for truth and veracity. If this question be answered affirmatively, the witness may then be inquired of as to what that reputation is, and whether from that reputation he would believe him on oath. *Mobley* v. *Hammit*, 1 A. K. Marsh. 589; *The People* v *Rutter*, 19 Wendell, 578; *The United States* v. *Van Sickle*, 2 M'Lean, 219; *Ford* v. *Ford*, 7 Humph. 100; *The People* v. *Mather*, 4 Wendell, 257; 1 Starkie on Evidence, 182; 11 Metcalf, 538; *Fry* v. *The Bank of Illinois, et al.* 11 Ills. 379.

tation of the witness for truth and veracity. The reason for thus restricting it as given is that there are many witnesses whose general character among their neighbors might be esteemed bad, yet they are scrupulously honest upon the witness stand, and their general reputation for truth is good, and for the further reason that it is only their character for truth that is involved in the issue upon which the jury or committee are called to pass. The regular mode of examining into the general reputation of the witness is to inquire whether he knows the general reputation of the person in question among his neighbors and acquaintances for truth and veracity, and, if that question is answered affirmatively, then the witness may be asked, what that reputation is, whether good or bad.

In the English courts and in the courts of a number of the States where the answer of the witness is that he knows the general reputation of the person, and that his general reputation is bad, then a further inquiry may be made as to whether from such knowledge the witness would believe the person upon oath. The propriety of this question has been recently questioned on the ground that it is having the witness assume the province of the jury, in passing upon the weight of evidence, for it will be observed that the inquiry is restricted to the belief of the witness, founded upon general reputation, and not upon his own personal knowledge, and when he has testified before the jury or committee they are as fully competent to draw their conclusions from the evidence as the witness, and it may now be safely assumed, both on principle and the weight of authority that the witness should not be permitted to give his own opinion, but his testimony should be confined to a statement of facts. One of the most difficult questions that the legal profession meet with in practice under this head is to make witnesses comprehend the nature and character of the knowledge that they must be possessed of, in order to be able to testify that they are acquainted with the general character of the person; and they often confound their own knowledge of facts and their own estimate of the character of the person with what they have heard others say. They can not understand how it is that hearsay evidence is rejected as unworthy of belief generally, and yet in this respect the entire inquiry is restricted to and based upon public rumor, or what is

said by the majority of a man's neighbors that have spoken about him in this respect. The principle upon which this testimony is admitted is, that the general sense and appreciation of every community is substantially correct, and that men do not ordinarily speak evil of others without just cause.[1] It is not enough that the impeaching witness has heard the person's reputation canvassed, but he must be able to state what is generally said of the person among those with whom he dwells, or with those with whom he is chiefly conversant; for it is this only that constitutes his general reputation or character.

An exception to this rule authorizing the impeachment of a witness on account of his general character for truth and veracity being bad is made in favor of members of the Church. Such was the decision of the General Conference in 1860, and such is the rule laid down by Baker on Discipline.[2] In answer to general impeaching evidence, the other party may in cross-examination inquire particularly into the witnesses' means of knowledge, and the evidence upon which they base their opinion. The inquiry upon a cross-examination may be made as to the names of the persons who had spoken against the character of the witness impeached, and also as to the statements made by such persons and the circumstances under which such statements were made, and the time, whether before or after *lis mota*, or the commencement of the suit or proceeding.[3] Mr. Greenleaf also lays

[1] It is not enough that the impeaching witness merely states what he has heard others say, for they may be few; he must be able to state what is generally said of the person by those among whom he associates, and by whom he is known, for it is this only that constitutes his general reputation or character. And it is error to permit the impeaching witness to speak to the general character unless he is acquainted with such general character. *Crabtree* v. *Kile et al.*, 21 Ill. 183.

[2] In impeaching the character of a witness in the second mode it is not allowable to impeach his general moral character, but his general character for veracity, and that not by producing testimony of particular facts of bad moral conduct, but by producing testimony as to the general fact of his unreliability as a person of veracity. Gen. Conf. Jour., 1860, p. 428; Baker on Discipline, 128.

The general character of a member of our Church for veracity can not be impeached, but the facts stated therein may be disproved by the testimony of other witnesses. Ibid. 129.

[3] Upon this point, there is a difference of opinion among the members of this court; but in the opinion of a majority, the inquiry, upon a cross-examination

down the rule that the party whose witness is attacked may in turn attack the character of the impeaching witnesses; and authority for this practice seems to be based on the decision in the case of *Hawson* v. *Hartsink*:[1] yet, notwithstanding this high authority, we think that upon principle such evidence is too irrelevant to be admissible; for if the rule is to be extended to the impeachment of the impeaching witnesses, it is without limit, and the multiplicity of irrelevant and improper issues will mislead and perplex without any profitable result, either to the witness attempted to be impeached or to the party in whose favor he has testified.[2] There is no doubt that it is the right of a party whose witness has been impeached, or attempted to be impeached, to sustain and support the general character of such witness by fresh evidence. The supporting evidence should, however, come from witnesses that are acquainted with the person whose testimony is attempted to be impeached, and with the general character of such person; but that general acquaintance is not necessarily founded upon his character having been previously canvassed for truth and veracity; for it is a fact borne out by the experience of every community, that the character of men whose reputation is good, is seldom canvassed or called in question, and they are judged of from this fact by their acquaintance more

as to the names of the persons who have spoken against the character of the witness impeached, was well warranted by principle, by the course of practice, and by the authorities. According to the impression and recollection of a majority of the Court it has been common in the course of practice to make such inquiry upon cross-examination. In point of principle it would seem proper to make this inquiry, because the witness is called on to state what is the reputation of the person impeached, what is his character for truth by report, what is said of his character for truth; and it may be very material and important to know from whom in particular the reports come, and what persons they were who spoke against the character of the person impeached. Upon such inquiry it may appear that all the persons from whom the witness has heard any thing against the person impeached are his personal enemies, and so situated in regard to him that their speech and reports are entitled to no consideration whatever. The inquiry may also be proper in order to test the extent and means of information possessed by the witness in regard to the character of the party impeached for truth and veracity. By allowing such inquiry it may perhaps be made to appear that the imputed bad character is wholly factitious, and got up for a particular purpose. *Bates* v. *Barber*, 4 Cushing, 109.

[1] 4 Esp. 104, per Lord Ellenborough; 2 Phillips's Ev. 432; 1 Starkie's Ev. 182.

[2] See *Rector* v. *Rector et al.* 3 Gilman, 117.

than from any statements that may have been made favorable to them.[1]

If a person is known to associate with others of reputation, character, and standing in a community, this of itself is strong presumptive evidence that the reputation of such person is good, and this fact may be taken into the account by the witness when he answers that he knows the general reputation of such person, and that too, although he may never have heard a word spoken either favorable or unfavorable of such person.

The veracity of a witness may also be called in question and impaired by evidence that he has made statements out of court contrary to those to which he has testified at the trial; but, as we have previously seen, he can only be involved in contradiction upon such matters as are relevant to the issue; and even before this is allowable, it is ordinarily necessary, in the case of verbal statements, first to call his attention to the time, place, and person connected with the supposed contradiction: and to ask the general question whether he has ever made such statement is not enough, because it may frequently happen that he can not

[1] It is urged that the Court erred in permitting the question to be put to a witness called to sustain the credit of another whether he would believe him on oath, after an admission that he had never heard his character for truth and veracity spoken of, but who had previously answered that he knew the witness, and the persons with whom he associated. I am of the opinion that the question was properly admitted. If such a question was not permitted, the most repectable man in the community might fail in being supported, if his character for truth should happen to be attacked. Living all his life above suspicion, his truth would rarely be the subject of remark. A neighbor might be obliged to admit, as in this case, that he had never heard it spoken of, and yet undoubtedly be competent to sustain him. The question is accurately and comprehensively stated by Mr. Phillips in his treatise on the Law of Evidence (Vol. i, page. 212, ch. 8). The regular mode, he observes, is to inquire whether they have the means of knowing the former witness's general character, and whether from such knowledge they would believe him on his oath. Other modes are also proper, which point the question directly to the character for truth and veracity. Mr. Starkie goes still further and expresses the opinion that the proper question is whether he [witness] would believe him upon his oath, leaving to the cross-examination to bring out the general grounds of belief.* The answer to the previous questions in the case before us fairly imported competent means of knowing the character of the witness to be supported, to bring it within the spirit of Mr. Phillips's rule. *The People* v. *Davis*, 21 Wendell, 315.

*4 Carr. & Payne, 392.

remember the fact unless his attention is challenged or directed to the particular occasion and to the surrounding circumstances that lead to the making of such statements.[1] This rule that requires the attention of the witness to be directed to the time, place, and person, is as applicable where the witness testifies by deposition and where the supposed contradiction is by letter, as where both the testimony and the statement made out of court were oral; in one case, however, it was held that where the deposition of the witness had been taken *ex parte* and without notice, that the rule was otherwise, and that evidence of the contradiction was admissible.[2]

The question has sometimes arisen—and we have before incidentally referred to it—how far or to what extent a witness who has been impeached by showing that he made contradictory statements out of court that were inconsistent with his testimony, may introduce evidence of other declarations made at different

[1] The rule is well settled in England, that a witness can not be impeached by showing that he has made contradictory statements from those sworn to unless on his examination he was asked whether he had not made such statements to the individuals by whom the proof was expected to be given.* This rule is founded upon common sense, and is essential to protect the character of a witness; his memory is refreshed by the necessary inquiries which enable him to explain the statements referred to, and show that they were made under a mistake, or that there was no discrepancy between them and his testimony. *Conrad* v. *Griffey*, 21 Curtis, 24.

This rule is generally established in this country as in England. (*Doe* v. *Reagn*, 5 Blf. 217; *Franklin Bank* v. *Steam Navigation Co.* 11 Gill & John. 28; *Palmer* v. *Haight*, 2 Barb. S. C. R. 213; 1 M'Lean, 540; 2 *ibid.* 325; 4 *ibid.* 378, 381; *Jenkins* v. *Eldridge*, 3 Story, 181, 284; *Kimble* v. *Davis*, 19 Wendell, 437; 25 *ibid.* 259.) The declarations of witnesses whose testimony has been taken under a commission, made subsequent to the taking of their testimony, contradicting or invalidating their testimony as contained in the depositions, are inadmissible. If objected to, the only way for the party to avail himself of such declarations is to sue out a second commission. Such evidence is always inadmissible until the witness whose testimony is thus sought to be impeached has been examined upon the point and his attention particularly directed to the circumstances of the transaction, so as to furnish him an opportunity for explanation or exculpation. This rule equally applies whether the declaration of the witness supposed to contradict his testimony be written or verbal. 3 Starkie's Ev. 1741.

[2] *M'Kinney* v. *Neil*, 1 M'Lean, 540.

* In the Queen's case, 2 Brod. & Bing. 312; *August* v. *Smith*, 1 Moody & Malkin, 473; 3 Starkie's Ev. 1740, 1753, 1754; *Carpenter* v. *Wall*, 11 Adol. & Ellis, 803.

times tending to corroborate him. We think that the decided preponderance of authority is opposed to receiving such confirmatory declarations where the same are made without being under oath.[1] This is especially true where the confirmatory evidence is made subsequent to his other contradictory declarations; for if such evidence was receivable, it would enable the witness at any time to control the effect of his former declarations, which he was conscious that he had made and which he might now have a motive to qualify or destroy.

Where a witness on the cross-examination is asked by counsel whether he has not, on some former occasion, given a different statement contradictory to his testimony, for the purpose of laying the foundation for his impeachment, can leading questions be put to the impeaching witness upon his examination in chief? Thus, can he be asked, in the first instance, whether the former witness, in conversing with him, made such statement or used such language? This form of putting the question is often resorted to, and to some extent has received the sanction of the *nisi prius* courts. A little reflection will, however, show that such form of question is improper; for, in the first place, it must evidently be unnecessary to lead the witness, because the mind of the witness is ordinarily challenged to the circumstances of the conversation and to the statement itself by the cross-exami-

[1] It is true that in *Lutterel* v. *Reynell*, 1 Mod. Rep. 282, it was held that though hearsay be not allowed as direct evidence, yet it may be admitted in corroboration of a witness's testimony to show that he affirmed the same thing upon other occasions, and that he is still constant to himself. Lord Chief Baron Gilbert has asserted the same opinion in his treatise on evidence (page 135); but Mr. Justice Buller, in his *nisi prius* treatise (page 294), says: "But clearly it is not evidence in chief, and it seems doubtful whether it is so in reply or not." The same question came before the House of Lords in the Berkeley Peerage Case (4 Campbell, 401), and it was there said by Lord Redesdale that he had always understood that for the purpose of impugning the testimony of a witness, his testimony at another time might be inquired into, but not for the purpose of confirming his evidence. Lord Eldon expressed his decided opinion that this was the true rule to be observed by the counsel in the cause. Lord Chief-Justice Eyre is also represented to have rejected such evidence when offered on the behalf of the defendant in a prosecution for forgery. (1 Phillips on Evidence, 215, note; 230, note.) We think that this is not only the better but the true opinion, and well founded on the general principles of evidence. *Elliot* v. *Pearl*, 12 Curtis, 186.

nation of the former witness and from having conversed with either the examiner or the opposite party before the cross-examination. The better practice is to inquire generally what the former witness said relative to the transaction, and thus leave him to the exercise of his own memory. Where the witness has a distinct recollection of the conversation, he requires only to have his attention directed to the subject; and if his recollection is so indistinct that a general question will not enable him to remember the conversation he is but poorly qualified to contradict the other witness. It seems to us that there is nothing in the nature of this particular class of investigation that ought to exempt it from the general rule governing examinations in chief. If there is any case in which that general rule that prohibits the asking of leading questions ought to be strictly maintained, it is the one now under consideration, where the question at issue between the two witnesses is a question of veracity or of mere memory. If it is a question of memory, the only correct practice is to allow the witness to speak for himself and to exercise his own memory without prompting. It may be proper, however, after the witness has answered the general question and has shown the contradiction, for the purpose of making the contradiction more complete, to inquire whether the former witness has or has not used the expression imputed to him.[1]

Where the witness to be impeached has his attention called to the time, place, and person involved in the supposed contradiction on the cross-examination says that he does not remember, but that he may have made the statement, such answer does not preclude the opposite party from calling witnesses and proving that he did make such statement. If the rule was otherwise, an unscrupulous witness might always avoid the effect of an impeachment by such an answer.[2]

[1] *Edmunds* v. *Walters*, 3 Stark. Ca. 8; 1 Campbell, 43; *Halleck* v. *Cousens*, 2 M. & R. 239.

[2] If the witness does not recollect the conversation imputed to him, it may be proved by another witness, provided it is relevant to the matter in issue (*Crowley* v. *Page*, 7 C. & P. 789, per Park, B.); but if he is asked upon cross-examination if he will swear that he has not said so and so, and he answers that he will not swear that he has not, the party can not be called to contradict him. *Lang* v. *Hitchcock*, 9 C. & P. 619.

Counsel will not be permitted to state to a witness the contents of a letter or other writing, and then ask the witness whether he wrote the same: but he should be required in fairness to show the letter or writing to the witness; for the contents of every writing, according to a well established principle of evidence, are to be proved by the writing itself, provided that the same is in existence. If the rule were otherwise, a party might succeed in getting a part of the writing in evidence without putting the whole instrument in evidence before the jury or committee. It is not required that the whole paper or writing should be shown to the witness; it is sufficient if those parts of it are shown upon which the examination takes place. Where a witness admits the instrument to be his writing he can not be examined as to the contents of it, but the whole instrument must be read as the only competent evidence of the fact. The rules of evidence will not permit a witness to be asked on examination whether he has written a particular thing, but the writing should be placed into his hands, and then he may be examined as to whether it is his writing. If a question be asked a witness generally, whether he has made certain statements, the examiner asking the question, on objection being made, will be required to state whether the question refers to oral or written statements, and if it refers to written statements the answer will be excluded, unless the writing is produced.[1] We have previously seen that where a witness is asked an irrelevant question with a view to lay the foundation for his contradiction, that the party asking such irrelevant question is concluded by his answer and can not introduce evidence of the supposed contradiction. The party calling the witness, however, where he has made answer to such irrelevant question, has a right to re-examine him as to the evidence so given.

When evidence of a contradictory character has been offered, such as that the witness has made statements out of court which are inconsistent with his testimony, with a view of impeaching his general character, or showing that his statements are unworthy of belief, some of the courts have held that this put his general character in issue, and that he was entitled to sustain it by

[1] The Queen's Case, 2 Brod. & Bing. 292–294.

showing that his reputation for truth and veracity was good. (*Rex* v. *Clark.*)[1] We have had occasion to examine that case, and find that it is not an authority in support of that position, and it is certainly at war with every principle of the law of evidence. However good a man's general reputation may be, and however much in public estimation he may be regarded as having a scrupulous regard for truth, this does not avoid the effect of the discrepancy between his different statements where once that discrepancy is proved to exist.[2]

CHAPTER IV.

WHEN A WITNESS MAY REFUSE TO ANSWER.

A WITNESS is not compelled by law to answer any question, the answering of which tends to expose him, or which may expose him to any kind of punishment or forfeiture, or which may even lead to a criminal charge. The rule may be stated thus broadly, that he is privileged from answering not only what may criminate him directly, but also whatever leads or tends to criminate him. This is a privilege that is secured by the *Magna*

[1] 2 Starkie has been cited as an authority sustaining that position.

[2] The general rule laid down in 1 Greenleaf's Evidence, 6th ed. 469, that by the evidence of contradictory statements of a witness, or of the fact that he has been in the house of correction, or the like, his general character for truth is in some sort put in issue, and general evidence may be adduced, is not supported by the cases there cited; for *Rex* v. *Clark*, 2 Stark. R. 241, which is the foundation of the *dicta* in the text-books, is a case of a rape, and not law as applied to any other cases. *Payne* v. *Tilden*, 20 Verm. 564, and *Sweet* v. *Sherman*, 21 Verm. 29, state the rule as the law of Vermont only and *Hadgo* v. *Gooden*, 13 Ala. 718, was decided by a court which held to the rule in 2 Brod. & Bing. 297. Professor Greenleaf's rule is opposed by the current of the English authorities, though the English courts have made an exception in the case of witnesses attempted to be impeached for fraudulent attestations, where the witnesses are dead. *Bishop of Durham* v. *Beaumont*, 1 Campb. 207; *Doe* v. *Walker*, 4 Esp. R. 50; *Doe* v. *Stephenson*, 3 Esp. R. 248; *Provis* v. *Reed*, 5 Bing. 435. It is also in conflict with the decisions of this Court in *Russell* v. *Coffin*, and with the laws held in Connecticut, New York, and Georgia, *Rodgers* v. *Moore*, 10 Conn. 13; *Meriam* v. *The Hartford N. H. R. R. Co.*. 20 Conn. 354; *The People* v. *Hulse*, 3 Hill, 309; *Stark* v. *The People*, 5 Denio, 106; *The People* v. *Gay*, 3 Seldon, 378; *Stamper* v. *Griffin*, 12 Georgia, 450; *The People* v. *Rector*, 19 Wendell, 569.

Charta and by the *Bill of Rights* in probably every State in the Union, and the reason is, if the rule were otherwise, question after question might be successively put to the witness, the answer to which might not directly criminate him, and yet enough might be gleaned whereon to found against him a criminal charge.[1] It is to some extent the province of the court to decide whether a proposed question has a tendency to criminate a witness, and it is also the duty of the court to protect the witness in the due exercise of his privilege, and to take care that the examination is not so conducted as to deprive him of this privilege. Often it becomes a very delicate and difficult task for the court to decide whether a certain question is privileged on this account or whether under the pretense of the witness guarding himself he may not screen others from justice, or withhold evidence that might be properly given. To a certain extent, in such case, the witness must himself judge what his answer will be; and if he says on oath that he can not answer without accusing himself, and the court are satisfied of the fact, or even have doubts with reference to the facts he will not be compelled to answer.[2] This rule is well illustrated by a trial before Lord Tenterden on an indictment for publishing a libel. The prosecution, after proving that the libel was printed at the defendant's request, called the defendant's clerk and asked him whether he wrote it. Lord Tenterden, C. J., said, "He is not bound to answer." The counsel for the prosecution then asked the witness, "Do you know who did write it?" The Court held that the question was competent, and the question was answered affirmatively. He was then asked "to name the person," the Court held "that he was not bound to do that because it might be himself."[3] The privilege, for such it is regarded, is not the privilege of the party against whom the evidence is offered, but it belongs to the witness, and has its foundation in a principle of natural justice. The right to refuse to answer is one of self-defense. Every man has the right to defend himself against a criminal charge, and no man can be compelled to be accessory to his own ruin, or to

[1] *Swift* v. *Swift*, 4 Hag. Ec. Cl. 154; *Paxton* v. *Douglas*, 19 Ves. 227; *Clayridge* v. *Hoare*, 14 Ves. 59.

[2] *U. S* v. *Burr*, 1 Rob. R. 207, 8, 242–245.

[3] *Rex* v. *Slaney*, 5 Carr. & Payne, 213.

expose himself to a criminal charge, or even to a forfeiture by giving evidence. A witness may, however, waive his privilege and answer at his peril, but where he consents to do so, he will not be at liberty to answer some questions and refuse to answer others. It would be unreasonable that he should be allowed, by any arbitrary use of his privilege, to make a partial or garbled statement to the prejudice of either party; but where a witness waives his privilege so far as to answer part of the questions tending to fix a crime upon himself, or subjecting him to an indictment, he can not avoid answering the remainder, but must give the whole truth.[1]

CHAPTER V.

PRESUMPTION IN FAVOR OF WITNESSES' VERACITY.

We have incidentally referred to the fact that it was the duty of the jury or of a committee empaneled or appointed for the purpose of investigating disputed facts, where the testimony of a witness is unimpeached or uncontradicted in some one of the modes known to the law, to give credit or credence to such testimony, the presumption of law being in favor of innocence and in favor of the veracity of the witness. A jury or a committee can not, from mere caprice, entirely disregard the testimony of an unimpeached witness; although they are the judges of the credibility of witnesses, they must judge of credibility as they judge of any other fact—that is, from the evidence. Before they are warranted to discredit a witness they must have some ground for disbelieving him; in other words, they must exercise their judgment and not their will.[2] If the rule of law were otherwise,

[1] *Dixon* v. *Yale*, 1 C. & P. 279; *Austin* v. *Painer*, 1 Simons, 348.

[2] *Robertson* v. *Dodge*, 28 Ills. 162.

It is difficult to establish a rule which shall regulate and limit the discretion of a court or jury in the degree of credit to be given to the testimony of different witnesses. Much must depend on the particular circumstances of each case. But there is no difficulty in saying that where the witness is unimpeached, the facts sworn to by him uncontradicted either directly or indirectly by other witnesses, and there is no intrinsic improbability in the relation given by him, neither a court nor jury can, in the exercise of a sound discretion, disregard his testimony. It is no less the duty of a court than of a jury to decide according to evidence. But it is mockery to talk of evidence if it is discretionary with the

it would be difficult to see upon what principle facts could be judicially established. If the testimony of a witness required corroboration before he is worthy of belief, then the corroborating witness, in turn, would require corroboration. This rule of law is not peculiar to judicial investigations, but is acted upon in every day's transactions between man and man. The greate t portion of our information is derived from others, and we are so happily constituted that our inclination and propensity is to speak the truth. This principle has a powerful operation even in men of the least veracity. They speak the truth at least fifty times to where they lie once. It requires no art or no previous discipline or training, but we yield to truth as a natural impulse. Men learn to speak falsely and to dissemble. Truth requires no previous education, but lies at the door of the lips ready to come forth, and it proceeds from neither good nor bad intention, but only from simple artlessness.[1]

tribunal to which it is addressed to disregard it upon the vague suggestion, unsupported by proof, of the bias of the witness. *Newton* v. *Pope*, 1 Cowen, 110.

[1] The wise and beneficent Author of Nature, who intended that we should be social creatures and that we should receive the greatest and most important part of our knowledge by the information of others, hath, for these purposes, implanted in our natures two principles that tally with each other. The first of these principles is a propensity to speak truth and to use the signs of language so as to convey our real sentiments. This principle has a powerful operation even in the greatest liars, for where they lie once they speak truth a hundred times. Truth is always uppermost, and is the natural issue of the mind. It requires no art or training, no inducement or temptation, but only that we yield to a natural impulse. Lying, on the contrary, is doing violence to our nature, and is never practiced, even by the worst men, without some temptation. Speaking truth is like using our natural food, which we would do from appetite, although it answered no end; but lying is like taking physic, which is nauseous to the taste, and which no man takes but for some end which he can not otherwise attain. If it should be objected that men may be influenced by moral or political considerations to speak truth, and therefore that their doing so is no proof of such an original principle as we have mentioned, I answer, first, that moral or political considerations can have no influence until we arrive at years of understanding and reflection; and it is certain, from experience, that children keep to truth invariably before they are capable of being influenced by such considerations. Secondly, when we are influenced by moral or political considerations we must be conscious of that influence and capable of perceiving it upon reflection. Now, when I reflect upon my actions most attentively, I am not conscious that in speaking truth I am influenced, on ordinary occasions, by any motive, moral or political. I find that truth is always at the door of my lips, and goes

The apparent and actual conflict that often takes place in the testimony of different witnesses, or of the same witness at different times, as is observable in our courts of justice, often leads to reflections upon the integrity and veracity of witnesses; and those conflicts are often unjustly imputed to corrupt and unworthy motives, prompted either by prejudice, partiality, or the desire for gain. That these considerations do often have a powerful influence upon the mind is not doubted; but prejudice or partiality, or even the love of gain, may be an innocent passion so long as its possessor is unconscious of its existence; it is only

forth spontaneously if not held back. It requires neither good nor bad intention to bring it forth, but only that I be artless and undesigning. There may, indeed, be temptations to falsehood which would be too strong for the natural principle of veracity, unaided by principles of honor or virtue; but where there is no such temptation we speak truth by instinct, and this instinct is the principle I have been explaining. By this instinct a real connection is formed between our words and our thoughts, and thereby the former become fit to be signs of the latter, which they could not otherwise be. And although this connection is broken in every instance of lying and equivocation, yet these instances being comparatively few, the authority of human testimony is only weakened by them, but not destroyed. Another original principle implanted in us by the Supreme Being is to confide in the veracity of others and to believe what they tell us. This is the counterpart to the former, and as that may be called the principle of veracity, we shall, for the want of a more proper name, call this the principle of credulity. It is unlimited in children until they meet with instances of deceit and falsehood; and it retains a very considerable degree of strength through life. If nature had left the mind of the speaker *in æquilibrio*, without any inclination to the side of truth more than to that of falsehood, children would lie as often as they speak the truth until reason was so far ripened as to suggest the imprudence of lying, or conscience as to suggest its immorality. And if nature had left the mind of the hearer *in æquilibrio*, without any inclination to the side of belief more than to that of disbelief, we should take no man's word until we had positive evidence that he spoke truth. His testimony would, in this case, have no more authority than his dreams, which may be true or false, but no man is disposed to believe them on this account, that they were dreamed. It is evident that in the matter of testimony the balance of human judgment is by nature inclined to the side of belief, and turns to that side of itself when there is nothing put into the opposite scale. If it was not so, no proposition that is uttered in discourse would be believed until it was examined and tried by reason, and most men would be unable to find reasons for believing the thousandth part of what is told them. Such distrust and incredulity would deprive us of the greatest benefits of society and place us in a worse condition than that of savages. Children, on this supposition, would be absolutely incredulous, and therefore absolutely incapable of instruction; those who had little knowledge of human life

when he becomes conscious and when he permits it to have an undue influence over him that it becomes corruption. Formerly a witness was competent to testify though he might be ever so biased or prejudiced in favor of the party calling him; yet it was different where he was shown by some of the known and recognized rules of evidence to have a direct legal interest in the result of the investigation. In the former, his bias went only to affect his credibility; in the latter, he was wholly disqualified and adjudged to be legally incompetent for the reason, as the law then stood, that under the powerful influence of pecuniary gain

and of the manners and characters of men, would be in the next degree incredulous; and the most credulous men would be those of greatest experience and of the deepest penetration, because in many cases they would be able to find good reasons for believing testimony which the weak and the ignorant could not discover. In a word, if credulity were the effect of reasoning and experience, it must grow up and gather strength in the same proportion as reason and experience do; but if it is the gift of nature, it will be strongest in childhood and limited and restrained by experience; and the most superficial view of human life shows that the last is really the case, and not the first. It is the intention of nature that we should be carried in arms until we are able to walk upon our legs; and it is likewise the intention of nature that our belief should be guided by the authority and reason of others before it can be guided by our own reason. The weakness of the infant and the natural affection of the mother plainly indicate the former, and the natural credulity of youth and authority of age as plainly indicate the latter. The infant, by proper nursing and care, acquires strength to walk without support. Reason hath likewise her infancy when she must be carried in arms; then she leans entirely upon authority, by natural instinct, as if she was conscious of her own weakness, and without this support she becomes vertiginous. When brought to maturity by proper culture she begins to feel her own strength and leans less upon the reason of others; she learns to suspect testimony in some cases and to disbelieve it in others, and sets bounds to that authority to which she was at first entirely subject; but still, to the end of life, she finds a necessity of borrowing light from testimony where she has none within herself, and of leaning in some degree upon the reason of others where she is conscious of her own imbecility. And as, in many instances, Reason, even in her maturity, borrows aid from testimony, so in others she mutually gives aid to it and strengthens its authority; for as we find good reason to reject testimony in some cases, so in others we find good reason to rely upon it with perfect security in our most important concerns. The character, the number, and the disinterestedness of witnesses, the impossibility of collusion, and the incredibility of their concurring in their testimony without collusion, may give an irrisistible strength to testimony, compared to which its native and intrinsic authority is very inconsiderable. Dr. Reid's "Inquiry into the Human Mind," Chapter 6, § 24, pp. 428–434.

or loss, he was adjudged by the law to be more likely to speak falsely than to depose to the truth. The conflict of testimony being then but imperfectly understood, was imputed to corrupt motives, and wherever a motive strong enough in contemplation of law could be found to induce the proposed result, the witness was adjudged incompetent. When a change was proposed some of the best legal minds, both in England and in this country, doubted the propriety of the change. The change has been made, however, in our civil tribunals with gratifying results. There are to-day no greater conflicts in the testimony of witnesses in our judicial investigations than there was before the old rule of exclusion had been set aside.

As we have previously said, and may have occasion to say again, the law can not, and does not, profess to set up an infallible test for the ascertainment of truth, but simply aims to arrive as nearly as possible at what is truth. Experience has shown that the old rule of incompetency was founded upon a mistaken idea in ascribing the conflict of testimony to a corrupt and venal motive, while in point of fact the number of witnesses who willfully depose to falsehood are comparatively few; not but that there are differences in the testimony of witnesses deposing to the same facts, and differences that it is sometimes hard to reconcile and harmonize, consistent with the credit and veracity of the witness or witnesses; yet such differences are often more apparent than real, and have their foundation in the capacity of the witness to observe, the strength, certainty, and tenacity of memory, and the ability of the witness to communicate his thoughts and ideas to others.

In addition to this it is proper to take into account the bias and interest of the witness, not with a view of impeaching his integrity, but for the purpose of making allowances for the peculiar training of the mind when directed in the channels of bias, prejudice, or interest. It is a fact demonstrated by scientists upon psychological principles, and borne out by the experience of courts and the legal profession, as well as by the observations of others, that an individual may so accustom himself to reason or think, that a matter which he knew in the beginning was false, by continuously revolving it in his mind, he comes to believe to be true. This is in accordance with the theory of a

certain sect who enforce the doctrine of passive belief to that extent, that their followers are required to believe their statements, however false and absurd, even to the contradiction of an express mathematical axiom that two and five make four. In all this class of departure from the truth, the crime or offense consists not in the statement of the falsehood, but in the statement of such falsehood willfully and corruptly made.

The discussion of this question more properly belongs to a treatise founded upon the peculiarities of the human mind than to a work on ecclesiastical law, but the one is so intimately and inseparably connected with the other, that we have seen proper to make a brief allusion to it in this connection, for the purpose of inducing reflection and investigation, founded upon the law of charity. There is in this respect, as we maintain, a mistaken notion extant, that a thing may be wrong and sinful without any reference to the motive or intent. There are wrongs without sin. Sin consists in the intent or motive with which an act is done, or even the entertaining of the motive without the doing of the act. Wrong consists in doing the act without regard to the motive; and they may converge and diverge, unite and separate. This distinction, though sometimes lost sight of in the law, is fully borne out with reference to the crime of perjury, the most heinous of all crimes known to the law. In order to constitute this crime, two things must concur; first, falsity of statement with reference to a material matter, secondly, a knowledge that the statement is false at the time it is deposed to.[1] A person might very honestly and conscientiously swear to a particular fact to the best of his recollection and belief, and his testimony

[1] The crime of perjury is the taking of a willful, false oath by one who being lawfully required to depose the truth in any judicial proceeding, swears absolately in a matter material to the point in question. The oath must not only be willfully false, but it must be material to the issue. For if it be of no importance and immaterial, though false, it is not perjury, because it does not affect the issue, and it lies upon the prosecutor to prove that it is thus material. And it is also necessary that it should be alleged in the indictment that the matter sworn to and upon which the perjury was assigned should be sufficient in themselves to establish the materiality. 4 Bl. Com. 137; *The King* v. *Dowling*, 5 T. R. 311; *Commonwealth* v. *Knight*, 12 Mass. 274; 3 Starkie's Ev. 1143; *The King* v. *Pendergast*, Gebb's Cr. Case, 64; Roscoe's Criminal Ev. 2 ed. 764; Laston's Case, 2 Rol. Rep. 41; *Commonwealth* v. *Pollard*, 12 Metcalf, 228, 229.

may be wrong and produce a wrong result, and yet he may be entirely free from moral wrong; and he may make such statement and afterwards from a chain of circumstances be convinced that he was wrong, and swear to the reverse of what he has previously testified to without meaning to swear falsely at either time.

The very fact, under such circumstances, of his correcting his first testimony when he becomes satisfied that it was false, is strong proof in favor of his sincerity and motive to tell the truth; were it otherwise he would naturally persist in the falsehood, unless he changed his statement in order to avoid subsequent contradiction. The rule is, and it is one founded on humanity and charity, that in order to reconcile testimony that is conflicting, we should endeavor to do so if possible without imputing corrupt motives to the witness, for so grave a crime should not be charged unless such charge can be made out beyond a reasonable doubt.

In determining the weight of evidence in a given case where there is conflicting testimony, often a slight preponderance one way or the other is sufficient to support the verdict of a jury or the findings of a committee; but on a trial for perjury, the perjury assigned must be established by two witnesses, or by one witness and proof of other corroborating facts and circumstances in support of the evidence of such witness, so loath is the law to conclude that the crime has been committed—a crime easily charged but hard to be made out. This rule, requiring two witnesses instead of one as in ordinary cases, has probably another logical reason upon which it rests, and that is, if there were but one witness to prove the falsity of the charge, it would be simply to oppose one oath to another,[1] and it leaves the question doubtful on which side the truth lies, and under such circumstances the jury are ordinarily bound to acquit; but like all other general rules, this rule may have its exceptions. The exceptions, however, serve but to illustrate and show the value and fitness of

[1] Sergeant Hawkins states it as the law, that it seems to be agreed that two witnesses are required in proof of the crime of perjury, but the taking of the oath and the facts deposed to may be proved by one witness only, and he is supported by modern works of authority. 2 Hawk. c. 46, § 10; Roscoe Crim. Ev. (2d ed.) 770; 1 M'Nally on Ev. 37.

the rule. One of the exceptions that is sometimes recognized is where the evidence consists of the contradictory oaths of the party accused. Thus, where depositions or affidavits contrary to each other have been emitted in the same matter by the same person, it may, with certainty, be concluded that one or the other is false. This, of course, is to be taken with the qualification that the accused or the party uttering such falsehood at the time of making such deposition, knew what the truth was, and knowingly testified falsely and where the probability of mistake is expressly negatived by the defendant himself, and the corrupt motive disclosed by his own voluntary oath. It differs from a case of voluntary oaths where there is nothing upon the face of either of the oaths upon which perjury can be assigned; for under such circumstances it is the duty of the public prosecutor to specify distinctly which of the two contains the falsehood, and peril his case upon the means he has of proving the perjury.

Where a defendant has been indicted for perjury and has made contradictory oaths or depositions, he can not be permitted to allege in vindication that either of the depositions were false, for whichever of them is given in evidence to disprove the other it can hardly be in the defendant's mouth to deny the truth of that evidence as it came from himself; provided that enough appear, either in the evidence used to establish the perjury or by proof of other facts and circumstances, to show a corrupt motive and negative the probability of mistake in that on which the perjury is assigned.

With this brief reference to the elementary principles of the law of evidence as applied in our civil courts, we will close this branch of investigation.

CHAPTER VI.

THE RIGHT TO OPEN AND CLOSE.

After the evidence in chief has been introduced by the prosecution, and the defendant has adduced his evidence, and the plaintiff has replied to the new evidence introduced by the defendant, the cause has progressed to that point in which the parties are each entitled to present to the jury or the committee

their respective theories, based upon the evidence—for counsel should never be permitted to present an argument that has no foundation in the facts proved. As we have previously said, whether there is any evidence is a question for the determination of the court or the presiding officer; whether the evidence is sufficient to establish the complaint or the defense is for the consideration of the jury or committee. It is also the province of each party to argue all questions relevant and pertinent to the issue, and the evidence tending to support the theory of each particular party. Care should be observed, however, in doing so, and especially in a Church investigation, that counsel should keep within the record—that is, they should carefully avoid the statement of any facts to the committee with a view of influencing their determination that have not been proven. More caution is required in reference to this particular point than almost any other arising in the course of judicial investigation. It is so easy for an artful and skilled advocate to blend mere statements of facts that are not proven with the evidence in the case, and to confound the one with the other in the minds of the committee, that the presiding officer can not be too strict and rigid in the enforcement of this rule. In laying down this rule, however, we do not design to be understood as restricting the argument of counsel to such a degree as to exclude illustrations, or as to prevent all just and fair comparisons.

It often becomes an important question, to be determined by the presiding officer, as to who shall be entitled to open and close the argument. We have previously said, while considering the rules of evidence and the party upon whom the burden of proof is devolved, that the party holding the affirmative of the issue, whether complainant or defendant, is entitled to begin and also to close the evidence; the same rule obtains with reference to the order of argument. It frequently happens that the defendant assumes, or is compelled to assume—owing to the peculiarities of the case—the burthen of proof. Thus, where the defendant has met the whole case with an affirmative plea, or where the defendant has admitted the *prima facie* case made or to be made out by the plaintiff, it has been settled in England, by rule adopted by the fifteen judges, that the plaintiff shall begin in all actions for personal injuries, libel, and slander, though the general

issue may not be pleaded and the affirmative be upon the defendant. In case of plea of soil and freehold tendered by the defendant, and on which issue was joined and trial had, there being no other plea or issue, the court were all clear that the right of opening and closing the argument belonged to the defendant. By such a plea the defendant admits the act complained of as a trespass, and undertakes to prove the property of the soil in himself; he has the affirmative, and if he fails to make it out, the verdict must be against him.[1] The question, however, as to who is entitled to open and close the argument, while often very material in courts of record where the question is to be tried, if narrowed by written pleadings to a single point or points, affirmed on the one side and denied or traversed on the other, is of little importance in criminal practice or Church investigation, as the usual defense is a denial of the charges and specifications, and the burthen of proof is upon the prosecution; there may, however, be cases where, even before an ecclesiastical tribunal, the defendant not being able to deny the charge in terms, but relying upon a justification in order to obtain the advantage of opening and closing the argument, would admit the charges and specifications. Under such circumstances we think that the defendant would be entitled to the affirmative.

After the argument has been closed, it is the duty of the committee or conference to retire and deliberate upon all the questions under consideration submitted to them for decision; and while it is the province of the committee or conference, strictly speaking, to judge of the facts, and of the presiding officer to determine the law, yet in passing upon the whole question of guilt or innocence, they must, *ex necessitate*, apply the law to the facts, and of course are compelled to pass upon it. And this evolves the question whether they should receive the law from the presiding officer, or judge of and determine it as they judge of and determine the facts. By every analogy of the law, we are forced to the conclusion that the presiding officer has the legal right to instruct the committee with reference to the law of the case where such instruction is essential to a correct determination of the issue presented. Beyond this the presiding officer should not

[1] *Davis* v. *Mason*, 4 Pick. 159.

go; he should take no part in their deliberations, further than to preside over the committee or conference till it has made up a verdict.[1]

As we have before intimated, the committee pass upon the entire question of the guilt or innocence of the accused, although such question may be compounded of law and facts. They have no authority, however, to determine the sufficiency or insufficiency of the charge or charges, specification or specifications; but they have the right to determine the question as to whether such charge, specification, or specifications are proved; and also the degree of guilt, whether of the first or second, or even of lesser degree; and in doing so it is proper for them to take into consideration all of the circumstances, whether they aggravate or modify the guilt. The committee in their finding should also fix the punishment; and when they have determined the character of the judgment or finding, such finding should be written out, specifying the charges or specifications upon which it is based, and then signed by a majority of the committee, or, as in the trial of a traveling preacher, by the president and secretary of the committee or select number.

It does not require the unanimous concurrence of all the members of a committee or of a conference in order to the rendi-

[1] The question has frequently been asked, May the preacher remain with the select number while they are making up their judgment? In reply, Bishop Hedding remarks, "Certainly he ought; for he is pastor of the flock, and he would greatly neglect his duty were he to be absent, and consequently not know on what law or evidence the judgment is rendered." Mr. Wesley believed that the New Testament makes the pastor responsible to Christ for the purity of the flock, and hence he should judge as to the guilt or innocence of the accused member. Our fathers administered the discipline on this principle up to the year 1800. It was then provided that the society or select committee should pronounce an opinion upon the guilt or innocence of the accused, and the action of the preacher was to be governed by this decision. The entire responsibility of the decision, we repeat, rests alone upon the committee. The preacher, under no circumstances, should attempt to balance the evidence, weigh probabilities, determine the credibility of witnesses, or draw inferences from the facts proved, and thus determine disputed questions of fact, even at the request of the parties. "No judicious administrator of the discipline," says Bishop Morris, "will let the committee or any other person know his opinion of the case, either before the trial or during its progress, till the number of the committee have made their decision and signed their names to it." Baker on the Discipline, Sec. 7, p. 109.

tion of a verdict, as in the case of a trial before a jury in our civil courts, but the finding of a majority of a committee or of a conference constitutes the decision. And by this provision, although it is a variance from the practice in our common law courts, substantial justice is obtained.

After the committee have agreed upon and signed a verdict, they should deliver the same to the preacher in charge, or other presiding officer; and, if there is any informality or irregularity in their written findings, the preacher in charge before receiving the same as the decision of the committee, and before they are discharged from the consideration of the case, may require such committee to correct and revise their finding, so as to conform it to the Discipline and usages of the Church. This, however, can not be done after the committee is discharged; and there is but one way of correcting such finding, and that is to take the same upon appeal before the proper appellate tribunal.

We have at some length considered the mode of conducting a trial, including the arraignment of the accused; the investigation of facts, the examination and cross-examination of the witnesses on the part of the prosecution and the defense, the order in which testimony should be brought forward, the argument of counsel, the charge of the presiding officer as to questions of law, material to the issue, and the verdict of the committee; and it now remains, under this head, to refer but briefly to the final action of the presiding officer, which, as we have already seen in case of an acquittal by the committee, is simply to direct the recording of the finding; and, in case of conviction, to pronounce the judgment, based upon the finding of the committee.

The presiding officer has no authority to grant a new trial, but the Discipline provides, in ¶ 229, that if in the trial of members of the Church the preacher in charge differ in judgment from the majority of the committee concerning the guilt or innocence of the accused, he may refer the case to the ensuing quarterly conference, which shall have authority to order a new trial. In all other cases a new trial, if had at all, must be secured through the order of an appellate tribunal to which the matter has been regularly carried. And the reasons for allowing new trials will be mentioned under the head of appeals.

After all proceedings authorized by the Discipline have been

had in the original trial, and the party arraigned has been found guilty, nothing remains but to pronounce such judgment as is determined upon by the Discipline, law, and finding of the committee, and this must be done before an appeal can be taken from the decision of the inferior court or tribunal to one exercising an appellate jurisdiction. If the rule were otherwise and the party might stay the judgment or sentence by praying an appeal, he might never have judgment against him, and wholly avoid the legal consequences by failing to prosecute his appeal. If an appeal is taken and the judgment is reversed, the effect of it is to annul the sentence, and the party is restored to his former *status* or relation, as though no sentence had been pronounced against him.

CHAPTER VII.

WHEN AND HOW TO TAKE AN APPEAL.

By the common law, proceedings by way of appeal were unknown. There was but one mode known to that system of jurisprudence by which a court of superior jurisdiction could review the judgment or proceedings of a court of inferior jurisdiction, and that was by a proceeding in the nature of a writ of error. And this mode of proceeding is still known to our civil tribunals. Nearly all the States, at a very early period in their history, provided for taking an appeal; and upon an appeal the appellate court, having acquired jurisdiction, has all the right and authority to revise the decision of an inferior tribunal that it has on a writ of error; in fact, the only difference existing now between the two modes of procedure is to be found in the manner of bringing the record and parties interested before the appellate tribunal. A writ of error is in the nature of a commencement of a new suit. It issues at the instance of the party complaining, out of the superior court, directed to the inferior court or subordinate tribunal, commanding them to certify up their record and proceeding, so that if error has intervened in the proceedings, the same may be corrected and revised. The parties have to be notified or summoned anew. Upon an appeal, however, the appeal is prayed by the appellant, and granted as a matter of strict right by the court or tribunal of original or inferior juris-

diction, and when granted, both parties, in legal contemplation, are before the court, and they are bound to take notice that the appeal has been prayed for and allowed, and no further notice or process is necessary in order to bring the appellee before the appellate tribunal; it is his duty to follow up the proceedings and to take notice of every step in the cause from the time proceedings are first instituted until the same is finally disposed of by the appellate tribunal. In this view of the question it is evident that the appeal should be regularly prayed for and allowed at the same time that judgment or sentence is pronounced; or, at least, it should be asked and allowed during the same term of court. In our civil courts, by a fiction of law, the entire term, without reference to the length or duration of such term, is regarded as but one day. And during the term the record and proceedings are under the control of the court, and may be revised or changed; but after the term is over no such power exists, except as to matters of mere form.

There is no provision in the Discipline for reviewing the proceedings of a Church tribunal except by an appeal; and where the party has omitted to pray an appeal and take the necessary steps to have the same perfected at the time of the trial, he has no authority to do so afterwards.

Where an appeal has been taken, it is the duty of the appellant to see that it is properly made up, and all the papers pertaining to it, including the evidence, properly certified and forwarded to the proper appellate tribunal; for if he fails to prosecute his appeal the other party may have the same brought forward, and, on motion, dismissed in the appellate tribunal. A failure to prosecute an appeal, however, does not give the tribunal from whose decision the appeal is taken any authority over the case or over the appellant until the appeal is finally disposed of, and it can only be disposed of by the appellate tribunal.

Having referred to the manner of taking an appeal, and the time at which such appeal shall be taken we propose to consider the different modes of proceeding upon the hearing of an appeal in the appellate tribunal, being careful to distinguish between such as are in the nature of original proceedings and such as are simply appellate or revisory.

CHAPTER VIII.

PRACTICE IN THE APPELLATE COURTS.

THE Discipline provides for two modes of procedure in an ecclesiastical court exercising appellate jurisdiction. First where the trial is *de novo*, as in the trial of the appeal of a bishop by the General Conference. Here all the facts pertaining to the accusation are subject to be considered, the same as though such tribunal was exercising original jurisdiction; and while proceeding in this way, all the rules of evidence applicable to a proceeding upon an original trial or investigation apply, and all the questions of a preliminary character, with reference to the admission of testimony and with reference to all other legal questions, are to be decided by the bishop presiding in the same manner as though it were an original investigation or trial. The legal effect of an appeal from an inferior to an appellate tribunal of the Church is to suspend the judgment or sentence until the case is heard and disposed of upon the appeal. And all irregularities, where the proceedings are *de novo*, that have taken place in the trial or investigation below are waived when the parties go to trial without objections before the appellate tribunal. If exception is to be taken on the ground of a want of conformity to the law in taking the appeal or in authenticating and certifying the proceedings, papers, and documents, the objection must be made before proceeding to trial; for it is too late to insist upon any such formal defects after the trial has commenced.

Where the trial before an appellate tribunal is *de novo*, the prosecution should regularly introduce their evidence in the same manner as if they were proceeding to make out an original case. There is no provision in the Discipline, rules of practice, or usages of the Church, which would require the prosecution or the defense to be confined or restricted to the evidence offered below. Indeed, the oral evidence taken upon the previous examination, reduced to writing and authenticated, is only admissible when it is made so by the express provision of the Discipline, or by the agreement of the parties. The rule is different, however, in regard to depositions. It is not necessary that they should

be retaken; but depositions, if legally taken and properly authenticated to be used on the former trial, may be used before the appellate tribunal. In view of this fact we apprehend that any objections to the sufficiency of the deposition, or to its authentication, may be made before the appellate tribunal in the same manner, and with the same effect that objections could have been urged before the original tribunal. This rule, however, is only applicable where the trial is *de novo*. Where objections to depositions are relied upon, especially to the formal parts, such objections should be regularly made before the commencement of the trial, or they will be regarded as waived.

The prosecution, in a trial *de novo* before an appellate tribunal, holds the affirmative of the issue, and is entitled to begin and to conclude both the evidence and the argument. But where the appellate tribunal is required by the Discipline to hear and determine the case upon the record, either upon the evidence originally taken and certified to the appellate tribunal, or upon questions of law arising upon the former trial and brought up for revision, a different rule obtains, for there the party complaining of error and irregularities in the proceedings holds the affirmative of the issue, and is entitled to begin and conclude the argument. As we have previously seen, every intendment in favor of the regularity and correctness of the proceeding is made by an appellate tribunal, and the party complaining of error must make it out. Thus, if an appeal from the ruling upon a mere abstract question of law was taken from the decision of a bishop, made in an annual conference, to a judicial conference, without preserving the evidence, or without showing that such decision was irrelevant, the presumption to be indulged by the judicial conference is that a state of facts existed, such as warranted and justified the decision, and that such decision was correctly made, thus devolving upon the party alleging error in the decision to show wherein the error consisted, and, if the decision under any state of facts consistent with the issue is sustainable, the appellate tribunal will presume that such facts existed.

After a party has been convicted and has taken an appeal, and where the trial is such as not to admit of the introduction of new evidence, the presumption indulged in favor of innocence is changed, and the party is no longer presumed to be innocent, for

his guilt is established and fixed by a tribunal of competent jurisdiction, and the prosecution then becomes the defendant, the burden of proof being upon the appellant or party accused to show such illegality or irregularity in the proceedings as to justify a reversal, for until the proceedings are reversed by competent authority his guilt is fixed, and there is no way of avoiding its effect where the court or other tribunal had jurisdiction, except by a direct proceeding in which the entire record and proceedings are opened up for inspection and examination.[1] The rule in our civil courts uniformly established carries the intendments indulged not only in favor of the decisions upon questions of law, but also upon questions of fact, to the extent of presuming in favor of the correctness of such decision where the evidence is conflicting and contradictory, concluding, and properly concluding, that it is the province of the jury, in the light of all the surrounding circumstances, to weigh it and to give to it such credit as it is entitled to, and an appellate tribunal is justified in disturbing the finding only when such finding is manifestly against the weight of evidence.[2] Where an appeal has been taken in a case, and by the provisions of the Discipline the appellate tribunal is restricted to an examination of the record and documents accompanying such appeal, and the appellate tribunal has no authority to review the facts further than the same have been preserved of record, and simply to revise and review the

[1] If the court had jurisdiction, however erroneous the decree may be, it can only be avoided by a direct proceeding for that purpose, and can not be attacked for error when brought in question in another and independent proceeding. *Weiner* v. *Heintz*, 17 Ills. 261.

[2] On this point Skinner, J., in the case of *French* v. *Lowry* (19 Ills. 159), says: "We can not disturb the finding of the Court. It is impossible so fully and certainly to comprehend the merits of a cause presented by the parties in open court and investigated directly through the medium of witnesses before the Court, thus affording opportunity of reviewing all the surroundings of the controversy and of judging of the means of knowledge of facts and fairness of the witnesses, on reproduction of the case by bill of exceptions. Therefore this Court will not disturb the finding of the Circuit Court, or the verdict of the jury on the facts, unless that finding is clearly wrong." A portion of the plaintiff's account was proved, and upon presentation no complaint was made concerning it by the defendant, except as to the time of payment; and the suit and recovery proved by the defendant in bar was upon a different demand, which could not embrace another demand not then due.

proceedings for errors appearing upon the face of the proceedings, certain rules of construction governing the practice of appellate courts are applicable and should never be lost sight of, for they tend to a correct administration of the Discipline. . We shall review them briefly for the purpose of showing their applicability. The first of those rules to which we desire to direct attention is, that a party will never be permitted to complain of error or of irregularity where such error or irregularity is in his own favor, unless he shows that he is injured by it. A party may, under peculiar circumstances, reverse his own judgment when he is aggrieved by it. In England, at one time, he might do so though not aggrieved, for a reason since exploded, that the king would lose his fine, and the reversal was for his benefit; but subsequently it was held that a party shall not reverse his own judgment unless he shows the error is to his disadvantage.[1] The second rule that obtains in an appellate proceeding is, that where there is a general objection to the admission of evidence, if it be one that if the particular objection had been pointed out it might have been obviated, the party making such objection will not be permitted to take advantage of it before the appellate tribunal; but where the objection is of such a character that if the defect had been pointed out it could not have been obviated, it is a ground for reversal or revision of the decision.[2] The same principle that led to the adoption of this latter rule has been carried to the extent of excluding from the consideration of the appellate tribunal all questions that were not made and fairly presented to the inferior jurisdiction whose sentence or judgment is sought to be revised; in all cases where, if the objection had been fairly made and the grounds of the objection specifically pointed out it might have been corrected without subjecting the party to the expense and necessity of an appeal. It is otherwise, however, where the objection is of such a character that had it been pointed out it could not have been obviated; and this on principle would seem to be right, for a party should not be permitted, when he discovers that errors are being committed, to lie silently

[1] *Stone* v. *Chase*, 13 Wendell, 282; *Beecher* v. *Shirley*, Chro. Jas. 212; *Hughes* v. *Stickney*, 13 Wendell, 280.

[2] *Merritt* v. *Seaman*, 6 N. Y. 168; *Pratt* v. *Foot*, 9 N. Y. 463; *Isham* v *Davidson*, 52 N. Y. 237.

by and wait until he has experimented upon the general result and then, if it is unfavorable, fall back upon an objection that he has tacitly waived by his silence.

If a party desires to avail himself of the rulings of a court or of a presiding officer upon an appeal, he must have the objection and the rulings of the court regularly minuted, so that they will be apparent upon the face of the record or proceedings; and this should be regularly done at the time, for unless the decision of the presiding officer is excepted to at the time or before the conclusion of the trial, the party can not do so afterwards or avail himself of the objection upon an appeal. Where an exception appears in the minutes of the proceeding, such exception will be presumed to have been taken in due time until the contrary appears.[1]

If the bill or minutes show on their face that the exception was not taken on the trial, it will be disregarded.[2]

[1] In the case of *Warren and Andrews* v. *Lyons and Evans* (9 Wend. 244), the Court held that they would presume that the exception was taken in due time, unless it is expressly shown that it was not taken until after the verdict.

Savage, Ch. J., held that where the defendant might have excepted and brought in review the decisions that were against him, but failed to do so, that the Court would not consider the objection, except so far as the defect in the particulars specified in the bill of exceptions. *Dean* v. *Gridley*, 10 Wend. 257.

[2] *Berly* v. *Taylor*, 5 Hill 580.

In *Starin* v. *The People* (45 N. Y. 337), the Court held, that where by the record it appears that the trial of the indictment was moved the trial must proceed. The prisoner's counsel then raised various questions, and among others, the one under consideration. The Court entertained these questions not only, but received evidence by admissions of the district attorney of facts to enable it to pass upon the questions intelligently and appropriately. The point we are now considering was not preliminary in its nature, but one proper to be raised and determined upon trial, and although the Court might have declined to entertain it at that stage of the proceedings, it was not improper to settle it in advance. It was fundamental in its character, and would necessarily give direction to the whole course of the trial, the evidence to be given, and the verdict to be rendered, and we can not say that it might not influence the composition of the jury itself, and the exercise of the right of challenge. The facts admitted by the district attorney were only proper to be proved on the trial, and when received they were as much a part of the evidence on the trial as any other. It is unnecessary to say that in order to avail himself of the exception the prisoner had a strict right to take it at the time he did. It is sufficient that the Court entertained the question and passed upon its merits as upon the trial, and that the parties so regarded it and acted upon it. It is too late to say that the exception

There are certain matters, to which we have referred under the different appropriate heads, of discretion with which a court or presiding officer is clothed, that are not subject to review by an appellate tribunal, unless such discretion is so manifestly wrong as to impress the appellate tribunal at first impression that injustice has been done. It is not enough to authorize the appellate tribunal to interfere that they would have exercised their discretion differently, but the exercise of it, before it is subject to revision, must be clearly and manifestly wrong. If the rule were otherwise, all judicial discretion would be at an end, and there would be no opportunity of tempering the rigor of the technical rules of law by the exercise of a sound discretion. Thus it is a matter of discretion with the court whether witnesses shall be separated during their examination, and the court exercising an appellate jurisdiction will not inquire whether that discretion was judiciously exercised or not.[1] So, also, it is discretionary with the court to hear additional testimony after the evidence is closed and before the jury has retired.

It is apparent, from the authorities referred to, that it is only matters of form that may be waived or dispensed with by tacit acquiescence or by construction of law, where the defect complained of is one of substance that materially affects, or might affect, the justice of the sentence or decision, or where there is an apparent want of jurisdiction or authority in the tribunal making the decision. The objection may be made before the appellate tribunal and insisted upon, notwithstanding that it was not made nor the question presented to the subordinate tribunal. This statement, however, should be subject to this important qualification, that it is only a want of jurisdiction over the subject matter that can not be waived. For illustration, the annual conference, by the Discipline, has no authority to try a local preacher for any canonical offense except the case is appealed and comes up regularly on appeal from a quarterly or district conference.

was not taken upon the trial. If a court in a civil or criminal case entertains and decides material legal questions which belong to and are properly a part of the trial before empaneling a jury, and the parties act upon them, such decisions should be deemed incorporated into the proceedings on the trial, or, in other words, a part of the trial itself.

[1] *Errissman* v. *Errissman*, 25 Ills. 137.

In consequence of this want of jurisdiction the annual conference could not acquire authority to investigate a charge against a local preacher even by the consent of parties, and where the consent of parties in such a case is apparent upon the face of the proceeding, still it would be the duty, on an appeal, to revise the decision without reference to the merits of the controversy on the account of the want of jurisdiction.

In all appellate proceedings in our Church courts, the purpose of the appellant is to overthrow or set aside the finding and sentence of the inferior tribunal. Such a result may be reached in either one of two ways: by reversing the decision of the court below, or by remanding the case for a new trial. If the appellate court, on hearing the testimony and pleadings in the case, reverses the decision already had, this reversal is in fact a verdict of acquittal, and not only restores the accused to the rights of membership and privileges of which he may have been deprived by the original trial, but operates as a bar to any further proceedings against him under the bill of charges on which he was tried.

If the case be remanded for a new trial, the appellant is not, by this act of the appellate court, acquitted of the charges against him, but he stands in precisely the same relation to the Church as he did after the charges were preferred against him and before he was tried; that is to say, he stands in the relation of an accused member, or minister, as the case may be. When the case is remanded for a new trial, the accused may be tried on the same charges as in the first trial; or the charges may be amended or modified; or they may be withdrawn and the prosecution abandoned. The withdrawal of the charges is not a bar to their being renewed and prosecuted at a future time.

If the court having appellate jurisdiction shall neither reverse the decision of the inferior tribunal nor remand the case for a new trial, the decision of the inferior tribunal stands as the final adjudication of the case, even though a motion in the appellate court to affirm the decision of the court below had been put and lost.[1] It is evident that the appellate tribunal, having acquired

[1] *Resolved*, That it is the sense of this Conference, that when the motions to affirm, to remand, and to reverse, have been successively put and lost, the de-

entire jurisdiction of the cause, are competent to make a final disposition of it, and it is discretionary with them whether they will direct a new trial or decide the case upon the evidence. They should not, however, proceed to a final sentence or determination of the case, and especially to a reversal of the decision of the inferior court where such reversal would take place in consequence of some defect in the proceedings which it is not in the power or jurisdiction of the appellate tribunal to revise, or in a case where the charges and specifications are not sufficient to support the findings. Nor should the appellate court proceed to a final determination of the cause when it is made reasonably apparent that evidence material and relevant to the issue has been excluded from the consideration of the inferior court; for no party ought to be deprived of the benefit of such testimony on a rehearing; and when our appellate tribunals are required simply to examine and revise the decision of subordinate tribunals, and have no authority to hear the case *de novo*, and can not, therefore, in hearing a case on appeal admit new testimony, in all such cases, simple justice requires that the case be remanded for a new trial. It may be proper to call attention to the fact that it is not every error committed in the course of judicial proceedings that would be a ground for reversing the judgment or sentence, or for granting a new trial. Where the appellate tribunal can see, from the whole record, that substantial justice has been done and that a new trial would result in the same way, they should affirm the proceedings, notwithstanding the error, provided that such error is not of a jurisdictional character.[1]

cision of the court below stands as the final adjudication of the case. *Journal of General Conference for* 1860, p. 248.

The committee having heard and considered the minutes, documents, and pleadings in the first appeal case of Benjamin T. Roberts, who appeals from the decision of the Genesee Conference whereby he was adjudged to be reprimanded before the Conference, proceeded to vote in the case, with the following result: On the question of affirming, nineteen voted in favor and nineteen against it; on the question of remanding the case for a new trial, the committee voted almost unanimously in the negative; on the question of reversing the action of the Conference, eighteen voted in favor and twenty against; a result which, as the General Conference has decided, leaves the decision of the Genesee Conference as the final adjudication of the case. *Journal of the General Conference for* 1860, p. 252.

[1] In the case of *Dishon et al.* v. *Schorr* (19 Ills. 62), the Court say: "We

A new trial may be granted whenever, in the opinion of the appellate court, substantial justice has not been done, owing to some error either in the rulings of the presiding officer of the inferior court, in the testimony of witnesses by which the facts are proved, or in the finding of the committee. Thus, if improper evidence was admitted on the trial, and such improper evidence induced or tended to induce the findings of the committee, the verdict should be set aside and the cause remanded; or where irrelevant testimony was admitted which might have influenced the committee in their findings.[1] So, where the prosecution has failed to establish some material fact essential to support the finding, a new trial may be awarded, and on a motion to set aside a verdict on the ground that it was not warranted by the evidence, the court, or the presiding officer, will not receive evidence to supply what was deficient at the trial.[2] A new trial may be granted also where there has been newly discovered evidence, that is, evidence that has come to light subsequent to the trial, and such evidence is material, and not merely cumulative, but relevant, and which, if offered, would probably induce a different finding. So a new trial may be granted to enable the defendant to disprove a fact which he could not have expected to be called upon to meet at the trial.[3] But a new trial should not be granted on after-discovered evidence, which merely goes to impeach the credit of the witnesses who testified on the trial.[4] Nor should a new trial be granted where the evidence to be adduced is merely cumulative, and when it goes to the fact principally controverted on the trial, and respecting which the party produced testimony in the case.[5] Again, a new trial may be granted where the jury

can not see wherein injustice has been done the plaintiff, or any such error in any of the proceedings so injuriously affecting them as to warrant a reversal of the judgment even if improper instructions have been given; yet, if the whole case shows that substantial justice has been done, a judgment will not be disturbed for that cause."

[1] *Clark* v. *Borce*, 19 Wend. 232; *Boyle* v. *Coleman*, 13 Barb. 42.

[2] *Watson* v. *Dellafield*, 2 Caines, 224; *Ritchie* v. *Putnam*, 13 Wend. 524; *Williams* v. *Wood*, 14 Wendell, 126; *Jarvis* v *Sewell*, 40 Barb. 449.

[3] *Sargent* v. ———, 5 Cowen, 106; *Parshall* v. *Klinck*, 43 Barb. 203.

[4] *Halsey* v. *Watson*, 1 Caines, 24; *Bunn* v. *Hoyt*, 3 John. 255; *Harrington* v. *Bigelow*, 2 Denio, 109.

[5] *People* v. *The Superior Court of N. Y.*, 10 Wend. 285; *Brisbane* v. *Adams*, 1 Saun. 195.

or committee have been guilty of any impropriety in making up their verdict, or have been approached in such a manner as might have influenced the verdict. Under such circumstances the verdict ought to be set aside without reference to the source or motive of the interference; it is enough that a juror or a member of the committee has listened to the statements of a third party, attacking the credibility of the defendant's witnesses;[1] but the mere fact that a juror attempted to communicate, or did communicate the verdict to the party in whose favor it is rendered, before it is made public in court, is not sufficient to warrant the court in setting it aside. The rule seems to be firmly established, that the affidavits of jurors or their evidence before the court are not receivable to impeach their verdict. This rule is founded upon public policy, with a view of preventing jurors from being tampered with.[2] The confessions of jurymen, as to their own misbehavior, but not as to the misbehavior of their fellows, in some cases, have been received in evidence on motion for a new trial, and upon principle it would seem that their affidavits as to their own misbehavior would be admissible.[3] A contrary doctrine was held subsequently by the Supreme Court of New York.[4] While the weight of authority is undoubtedly opposed to allowing jurors and arbitrators to impeach their verdict, it is equally well settled that the affidavits or the evidence of jurors is receivable in support of the verdict.

The effect of the granting a motion made for a new trial is to reopen the investigation, and to entitle the parties to a trial *de novo* before a new jury, or a different committee, and upon such second trial, before a tribunal of the Church, the evidence must be taken the same as though no previous trial had taken place, and the minutes of the evidence taken on the former trial are not receivable in evidence upon the subsequent trial, except by consent of parties. The rule, however, is different with re-

[1] *Nesmith v. Clinton Fire Insurance Co.*, 8 Abbott's Prac. 141.

[2] *Dana* v. *Tucker*, 4 John. 487; Francis's Case, 1 Ch. Rec. 121; *People* v. *Barker*, 2 Wheeler Crim. Cases, 19; *Clum* v. *Smith*, 5 Hill, 560; *Brownell* v. *M'Ewen*, 5 Denio, 367.

[3] *Smith* v. *Cheetham*, 3 Caines's Cases, 57.

[4] *Clum* v. *Smith*, 5 Hill, 560; *The People* v. *Hartung*, 4 Park, 256; *Taylor* v. *Everet*, 2 Howard's Practice, 23.

spect to depositions that have been legally taken and properly authenticated; and with respect to all other written evidence, the restriction only applying to the verbal proofs.

It is evident from a careful review of the principles of municipal law, the rules of evidence, and a correct administration of those rules of law and principles of evidence, that the law is not what it is erroneously supposed by many to be—a mere game of chance, in which, without any reference to the principles of right and wrong, the decision turns upon the skill of the players. There are, however, in the legal profession, men to be found, as they are to be found every-where else, who never comprehend the fundamental principles of the law as a science, but who depend for their success wholly upon some dishonest trick or some mere technicality. Such men are subject to just reproach, and are fast losing what little prestige and standing they have in the profession, and the liberal and enlightened administration of the law by our courts tends to the accomplishment of this end. In Church investigations, usually conducted and carried on by ministers of the Gospel, these practices and tricks of the legal profession should be carefully avoided, in order that the reproach of the profession may not fall upon them. It is justice, and justice only, that every administrator of the Discipline should look to the rules of law only as guides to the accomplishment of that purpose.

PART SIXTH.

PRINCIPLES APPLIED.

CHAPTER I.

THE LEGAL EVIDENCE OF THE AUTHENTICITY OF THE SCRIPTURES.

IT is asserted by some distinguished divines (and claimed as true by the infidel world), that belief in the truths of revelation is a matter of faith and not of evidence; or to state the proposition in another form, that there is no legal evidence for assenting juridically to the Bible as true, and that because thereof we ought not to accept it as a matter of belief.

It is difficult to define the boundary between faith and evidence, or to say where the one begins and the other ends, or to say to what extent faith acts in molding our belief in the establishment of any given fact or proposition. Thus it is every day's practice in our courts of justice to give credit to the unimpeached testimony of a single witness, for the reason that we have faith in the integrity of such witness. The proposition, however, that man can believe without evidence is, to our mind, not tenable. Man is so constituted by nature that he requires evidence as the basis of belief, and it should be the object of all sound jurisprudence to render formal truth, as far as possible, the reflex of real truth. This result, however, can only be approximately attained. What is and what is not such evidence as may constitute the ground of belief is nowhere legally determinable, but depends for its solution upon the intelligence of the witness, his previously known character for truth and veracity, and other concomitant circumstances, and is as variant as the minds of men; so that it is impossible to define legal evidence or to distinguish legal evidence from that which is received and acted upon by mankind in general.

We do not wish to be understood as asserting that faith is not an essential element in molding and fashioning our belief. Faith

can not exist without evidence, neither can evidence exist independent of faith. We are so constituted that we incline to believe, and this with a child amounts almost to credulity, but is weakened as we mingle in the world and come in contact with falsehood and deception. Credulity is often said to be the attribute of weak minds and unlimited skepticism to those who make their own knowledge the exclusive standard of probability. A little reflection must satisfy every mind that this kind of skeptical philosophy, if carried out in practical life, would undermine all our social as well as all our legal and governmental relations, and resolve mankind back into a state of nature. We receive with confidence the testimony of the historian, as we shall hereafter show, in regard to the occurrence of past events; and that of the traveler and explorer with reference to the state and condition of other countries; and that of the naturalist in regard to natural history.

We have previously divided evidence with reference to the degrees of certainty necessary to our belief into two parts. One we have termed mathematical certainty, or that degree of certainty which is capable of demonstration by the known science of mathematics; but even in regard to mathematical certainty, faith is an essential ingredient, especially with the uneducated and illiterate masses who have no knowledge of the science; their evidence rests upon faith in the known skill and integrity of the mathematician having capacity and opportunity for observation, and without any apparent influence from passion or prejudice to pervert the truth. Thus the unlettered and uneducated who have never comprehended or attempted to comprehend the science of astronomy, and have no acquaintance with the course of the heavenly bodies, knowing nothing of their transits and conjunctions, or the relation that the one sustains to the other, or the influence that one of those heavenly bodies exerts upon another, would be confounded with the process of mathematical calculation employed by the astronomer while engaged in tracing out and fixing with certainty ten, twenty, or a hundred years hence the exact moment for the appearance of an eclipse of the sun, and whether partial or total, and the exact spot upon the earth's surface where such eclipse would be visible, and the length of time requisite for the planet's passing between

the sun and the earth in making its transit. Yet when such astronomer has completed his investigations and calculations based upon the known influence and relation that one planet sustains to another and has declared the result, the whole civilized world, with but few in it capable of comprehending the science or capable of comprehending the process of calculation, research, and reasoning upon which the astronomer bases his assertion, believes in the happening of the event, and acts upon such belief; and States and nations fit out ships and expeditions—as they did a few years ago—with corps of astronomical observers to go to the place designated and take observations, and by that means add to the certainty and accuracy of the science. If such astronomer is corroborated by other astronomers of known reputation who have made similar observations, research, and calculations with like results, our belief is still further strengthened, and we implicitly trust those scientific experts, for the reason that we have confidence in their ability and faith in the science, and we see no motive for questioning their integrity or calling their veracity into the account, and because thereof we accept the fact and call it mathematical certainty; while to the great mass of mankind the evidence is based not upon demonstration but upon simple faith and the known and received opinion of others, and the known and experienced connection between collateral facts.

This is merely the legal application of a process familiar in natural philosophy, showing the truth of an hypothesis by its coincidence, whether such coincidence be physical or moral, and whether the knowledge of it be derived from others through the known laws of matter and motion, or from the physical, intellectual, and moral habits of men.

The other degree of certainty may be termed moral certainty, and as such it is incapable of demonstration, but depends upon its relation to other concomitant circumstances that are usually found attending it, and is based not only upon our own experience and observation, but upon the experience, observation, and research of others. Thus we see an animal with web feet, and we say of such an animal, with a degree of moral certainty, that it is of aquatic habits; or we see an animal with large and sharp tusks or fangs, and we say that it belongs to the class of carnivorous animals. We make this statement from the known con-

nection existing between the one and the other, oftentimes not upon our own personal knowledge of the fact, but upon the known and received opinions of others, whose opinions, it may be, are based upon the opinions and experience, observation and research of others successively, with but comparatively few persons who have any thing better than the authority of others for their belief in the existence of the fact. The number qualified to speak from their own personal knowledge and experience as to any given event is comparatively few. We believe in the conquests of Alexander and of Cæsar; we believe that Greece was the cradle of science, and that Rome gave civil law to the world, upon the statements made by a few historians who have given research and investigation to the subject of which they profess to treat; we accept their statements, confide in their integrity, because there is no motive to deceive, believe the facts they assert and act upon the probabilities of the truth of their assertion. This we call moral certainty.

The evidence of the authenticity of the Scriptures belongs to this latter class, or to what we have termed moral evidence, and the Scriptures, from their very nature, are incapable of any higher degree of proof, but can be as well authenticated in accordance with the rules of evidence received and acted upon in our courts of justice as any other historical or traditional statements.

Before proceeding with a further discussion of the question, it may be well to institute an inquiry as to whether there ever was, or now is, a necessity for a revelation from Jehovah to man, having in view simply the welfare of the race. It is claimed that without a revelation from God, mankind would have been able to comprehend not only that there is a God, but that man is immortal. This pretension, however, is in strange contrast with the idolatrous worship and pollutions of the heathen world as the same are portrayed by St. Paul in the first chapter of Romans. Some of the heathen nations adored the personification of heroic valor, revenge, and cruelty. The most enlightened and the best cultured of all the heathen nations were the Greeks and the Romans, and their mythologies abounded in gross licentiousness, in excesses, and in vice. Reptiles of the most loathsome character were deified as gods by the Egyptians; frightful idolatry, and even cannibalism, exist to-day in

Polynesia, and Western and Southern Africa. The ruling principle that governed in all the features of paganism tended to man's degradation.

Under such a state of moral prostration, nothing short of a revelation from Jehovah would arouse man from his low state of moral pollution, and stamp upon him the true image of his maker. It is claimed that this result might have been accomplished through the increase of light and knowledge, but experience has demonstrated that civilization in the heathen world was only another name for voluptuous refinements. We venture the assertion that but for the influence of the Bible, mankind would never be raised up to that state or condition in which they would comprehend that virtue is essential to happiness. Whether there was a necessity for a revelation is a matter of no importance provided that God gave to man a revelation. The necessity for it only strengthens the probability that God gave it to man. The Bible professes upon its face to be a revelation from God. If it be conceded that it is not, but is a work of mere human production, then its integrity is essentially impaired and the veracity of its authors impeached.

Heathen mythologies recognized the existence of sin in the world, or the existence of right and wrong; the difference between them and the Bible in this respect is this,—they call evil good and good evil; the one is a human standard, erected by fallible creatures and bearing the impress of its fallibility upon its face; the other is a divine standard, fixed by God himself, "for by their fruits ye shall know them," and the proof that it is so is found in the fact that the observance of the principles of right as taught in the Bible are promotive of individual and national happiness.

The Bible is the oldest authentic record in the world, and the fact that it is so may be gathered from heathen mythologies and pagan history. These contain a recognition of some of the teachings of the Bible; not, indeed, found in their original purity, but mingled with their heathen pollutions. We have in the Bible very early traces of the law of sacrifices, consisting of the choicest of the flock, as typical of the sacrifice that was to be made on Calvary by the Son of God for the sin of the world. We have in heathen mythologies, instead of the heifer, the goat,

or the dove, human sacrifices offered for the purpose of appeasing the supposed wrath of their deities. We have in the Bible an account of the institution of the family, the patriarchal and governmental relations. We have in the pagan world, though imperfectly observed, the same relations. We have in the Bible a sovereign power asserted by God over his creatures for their moral government, and at one time for their municipal government; we have in the heathen world an acknowledgment of dependence, and the recognition of sovereign power existing not *de jure*, but in their imaginations. All of these are so many corroborating circumstances tending to establish the authenticity of the Scriptures.

Man, wherever found, under whatever state or condition, is essentially a worshiper. It has been so, as far as we have any trace from the first ages down to the present time. The most exalted intellect, the lowest created intelligence, recognize this universal law, and bow with adoring homage to either a real or an imaginary superior being. This acknowledgment on the part of mankind is strong proof of man's inferiority, and of his dependency, and is consistent with the account of man's fall by reason of transgression as given in the Bible. Man is represented by reason of sin as being involved in misery, and incapacitated for the service and fellowship of God, obnoxious to his judgment, and liable to punishment in a future and eternal state of being; and in consequence of this deporable state, feeling his weakness and realizing his dependence, he seeks for guidance and direction. This dependence seems to be firmly engrafted in his very nature, and constitutes a strong argument in favor of the account of man's original transgression as recorded in the book of Genesis.

The Bible contains an account of the call of Abraham, his separation from his brethren, and the history of his descendants, constituting the Jewish nation, together with prophetic declarations that his seed should become great, and that kings should come out of his loins; that is, in legal parlance, that he should be the common ancestor of the kings of Israel and Judea, and that his seed should sojourn in a strange land. Profane history is replete with the recognition of the fulfillment of this part of the prophetic Scriptures. We have the descendants of Abraham, the Jewish people, scattered every-where in our midst and in the

midst of foreign nations. They have ceased to be a nation in the generic sense of the term, and yet they have never lost the peculiarities ascribed to them in the Scriptures, as characteristic of their nationality. That there were such men as Abraham, Isaac, and Jacob, and that they are not merely mythical characters; that the Israelites were divided into tribes, that they went down into Egypt and sojourned there, and afterwards took possession of part of the land of Palestine, driving out the nations that were there before them, built cities, had a regularly organized government, engaged in wars with surrounding nations, had internal dissensions, built a temple and dedicated it to Jehovah, commemorated their deliverance from Egyptian bondage by an annual feast called the feast of the Passover, are abundantly corroborated and established by profane history, and by Josephus; and no historian of any respectability would venture to call these and like facts recorded in the Bible in question. Coming down to a later period, we have authentic evidence that[1] the Jewish nation were subjugated by the Romans, and that the Romans divided their territory into tetrarchies, and appointed kings, procurators, and governors over them, and exacted tribute to be paid by them to Rome; that during the time the Jews were subject to the Roman government, the Romans, according to their usual custom in dealing with subjugated provinces, permitted them to observe their religious rites and ceremonies, including their feasts, that were never remitted from the time they came out of Egypt up to and including the destruction of their temple by Titus.[2]

[1] "When Cæsar had settled the affairs of Syria he sailed away, and as soon as Antipater had conducted Cæsar out of Syria he returned to Judea. He then immediately raised up the wall which had been thrown down by Pompey, and, by coming hither, he pacified that tumult which had been in the country, and this by both threatening and advising them to be quiet, for that if they should be of Hyrcanus's side they would live happily and lead their lives without disturbance in the enjoyment of their own possessions; but if they were addicted to the hopes of what may come by innovation, and aim to get wealth thereby, they should have a severe master instead of a gentle governor, and Hyrcanus a tyrant instead of a king, and the Romans, together with Cæsar, their bitter enemies, for that they would never bear him to be set aside whom they had appointed to govern; and when Antipater had said this to them he settled the affairs of this country." Josephus's "Antiquities of the Jews," page 286.

[2] "So Titus retired into the tower of Antonia, and resolved to storm the temple the next day, early in the morning, with his whole army, and to encamp

The books of Chronicles give a long list of the names of families, tracing carefully the line of descent, and their tribal relations. These lists were made up and carefully preserved with a view to the service of the tabernacle and afterwards of the temple, which service was regularly conducted by course. This mode of conducting the service was observed from the time of David and Solomon, according to the Scripture account, down to the coming of Christ. St. Luke, in the first chapters of his Gospel, speaks of Zachariah, the father of John the Baptist, as belonging to the course of Abia, which, by reference to Chronicles, will be found to be the eighth course of those who ministered around the temple. Josephus speaks of those courses, thereby corroborating the account given by St. Luke.

It is perfectly consistent with the history of nations and their course of procedure that a record and an authentic record should have been kept and carefully preserved by the Jews, in which should be enrolled all the principal political and religious events of the nation, including the division of the tribes, the installation of kings and of priests, their foreign and domestic wars, the building and destruction of the temple, the enrollment of their laws, with such other public events as were esteemed by them worthy of being commemorated, whether they related to prophecies or the fulfillment of prophecy. These records thus kept were not

round about the holy house. But as for that house, God had for certain long ago doomed it to the fire, and now that fatal day was come, according to the revolution of ages; it was the tenth day of the month Lons, upon which it was formally burnt by the king of Babylon, although these names took their rise from the Jews themselves, and were occasioned by them, for upon Titus's retiring, the sedition lay still for a little while, and then attacked the Romans again, when those that guarded the holy house fought with those that quenched the fire that was burning the inner [court of the] temple; but these Romans put the Jews to flight, and proceeded as far as the holy house itself. At which time one of the soldiers, without staying for any orders, and without any concern or dread upon him at so great an undertaking, and being hurried only by a certain divine fury, snatched somewhat out of the materials that were on fire, and, being lifted up by another soldier, set fire to a golden window through which there was a passage to the rooms that were round about the holy house, on the north side of it. As the flames went upward, the Jews made a great clamor, such as so mighty an affliction required, and ran together to prevent it, and now they spared not their lives any longer, nor suffered any thing to restrain their force, since that holy house was perishing, for whose sake it was that they kept such a guard about it." Josephus's "Wars of the Jews," book 6, chap. 4, p. 555.

records of private but of public acts, known at the time to the entire nation at large, and the fact that the original enrollments are lost, destroyed, or worn out, can not impair their verity, or the verity of authenticated copies. It is every day's practice to admit authenticated copies of public records, to be read in evidence without requiring, as we have previously shown, the production of the original, or without accounting for its loss or destruction—in this respect, making a distinction between the rule as applied to public and private writings; and this distinction is well founded in the very nature of things. The knowledge of what is contained in a private writing is ordinarily limited to the parties interested in the writing, or at least the knowledge of the contents of a private writing is confined to a few persons. In a a public record enrolling public events it is far otherwise; the entire public are interested in having an authentic and faithful record of what is transpiring, which concerned the public at large, as private parties are interested in having an authentic statement in writing of what pertained to their private transactions. It would not do to suppose that the records of a nation were falsely reported; on the contrary, every intendment is in favor of their verity, and under most circumstances, such is the weight and authority of these public records, that they are not allowed among civilized nations to be called in question judicially, but on the contrary, their authenticity is conclusively presumed. The Old Testament Scriptures profess or purport to be copies from such authentic records, properly reported and carefully preserved by the Jewish nation, and it matters very little in this view of the question whether they were transcribed by one person or another; the more important question being, are the copies faithful transcripts of the originals?

The relation that the Jewish Church sustained to the civil government, even after they desired and obtained a king, was very close and peculiar, so that the one was inseparably interwoven with the other. The history of the Church was the history of the Jewish nation, and the history of the nation comprised the history of the Church; their feasts, their sacrifices, the worship of the temple, and the administration of the civil affairs of the nation, were all blended together; their government, originally theocratical in form, ordained of God and set up by Moses

after they had thrown off the yoke of their Egyptian task-masters, and while they were in the wilderness at the foot of Sinai, contributed to produce such a result. The Bible represents that that government was heralded to the people by the prolonged blast of the trumpet, the quaking of the mountain, and the voice of Jehovah heard from the midst of the smoke and thick darkness. It was authoritatively given, accompanied with all the insignia of power, and solemnly ratified, in a democratic form, by a convention of the entire people, each one professing fealty and obedience for himself; and no Jew has ever doubted the authenticity of these enactments or proposed to separate between that which pertained to their religious duties and their civil rights; and instead of being kept distinct they were always regarded by the Jewish nation as being inseparably united, and one was just as authoritative as the other.

It was Samuel, ordained a prophet of God, clothed with both civil and ecclesiastical authority, that poured the anointing oil on the head of Saul, and afterwards on the head of David, anointing them successively as kings over Israel. But their government, while it had the effect to destroy the theocratical form, did not displace the service of Jehovah. Their prophecies, and every thing that pertained to their religious rites and ceremonies, including songs, all continued to be enrolled and of public record, and were as much a part of the authentic records of the Jews as the enrollment of the names of their kings, and therefore equally entitled to credit according to our modern received and recognized rules of evidence.

We have had occasion to call attention to certain things that courts *ex officio* take notice of without proof; not that proof was not essential to establish their existence, but the questions have been so often before the court for their investigation, and the proof has been so often offered and received, and the judicial mind has become so familiar with the fact, that the court considers the question as *stare decisis*, and therefore no longer the subject of inquiry. This is the rule that for more than a thousand years—first in England and then in this country—has obtained with reference to the authenticity of the Scriptures; and so firmly is it imbedded in our national polity, that our entire judicial system is founded upon it, and no judge or court sitting

judicially would now permit their genuineness to be called in question any more than they would suffer an inquiry in this country into the original charters of the Colonies, or in England an inquiry into the genuineness of the *Magna Charta*. The original manuscript upon which the whole theory of English liberty is based has been lost, destroyed, or worn out by the lapse of time, and the evidence of it rests upon the basis of successive judicial and historical recognition, being now evidenced by the writings of distinguished sages in the law, and by the reports containing decisions of the courts. What lawyer or judge, finding the decision of a question by the court, together with the names of the parties, would doubt the genuineness thereof if such decision comes down to us reported in the Year Books, or even if the same was taken by some elementary author of known reputation as having been recorded therein? We believe the assertion not because we have seen and examined the Year Books, but because we have confidence in the integrity of the author, and know of no motive prompting him to deceive.

The original manuscripts written by the authors of the sacred Scriptures have been lost or destroyed, yet the integrity of the text has been carefully preserved to us, and, in addition, it has received the authoritative recognition of the Jewish and Christian Churches from the time of Moses and Ezra down to the present. No orthodox Jew has ever doubted the Old Testament Scriptures, and no Christian Church has doubted the New Testament Scriptures; and to-day both are as well authenticated, legally, as any genuine historical fact can be, in view of the long lapse of time that has intervened from their commencement down to the present time. That the Scriptures come from the proper Jewish and Christian repositories, as we have previously shown, has never been questioned, and that those repositories claim them to be authentic has never been questioned, and that this would be a sufficient foundation for their admissibility in evidence if the question of their genuineness was *res integra* is well settled by adjudication,[1] independent of all other corroborating circumstances.

[1] *Bishop of Math* v. *The Marquis of Winchester*, 1 Bingham's N. C. 185, 200, 201; 1 Starkie on Evidence, 332, 335, 381, 386; *Doe* v. *Phillips*, 10 Juris. page 34; *Croughton* v. *Blake*, 12 Ness & Welch, 205.

We will now call attention to a few elementary and well considered principles in the law of evidence which come down to us through a succession of ages, having received the sanction and approval of the best legal minds in Europe and America, and which have been found essential guides to the attainment of truth. One of these rules is, that the law presumes every person to be innocent of crime or wrong, every person to be honest, and every witness to be credible; and it devolves the burthen of proof upon the party charging the crime, imputing the wrong, or attacking the veracity of the witness. Courts of justice act upon this principle even where life, liberty, property, and reputation are involved; and they are judicially bound to receive as true and to act upon the unimpeached testimony of a single witness.

This rule of evidence is based upon the known disposition of mankind to speak the truth rather than to give utterance to falsehood where there is no motive to deceive. That some men do commit crime, that some men do commit wrong, and that some men do depose to falsehood, is an admitted fact; but few men commit crime publicly or testify falsely to facts that are publicly known, and but few witnesses are so abandoned as to be guilty of perjury where there is no motive to deceive and where the witness is without bias or interest.

There is another rule of evidence that stands in intimate relation with the one under previous consideration; that is, that ordinarily, testimony entitled to judicial belief must be given under the solemn sanction of an oath administered under forms of law, or at least some kind of sanction or admonition must be administered to the witness to speak the truth. An exception to this rule is allowed where a party makes a statement or confession against or prejudicial to his own interest. Experience has proved that men are not ordinarily so indifferent to their own interest as to make statements prejudicial to them falsely. Where there is no apparent motive for making a false statement or giving utterance to falsehood, the law receives such statements as true when made against interest without oath or affirmation or other ancillary proof. Men sometimes make statements prejudicial to their own interests where they are prompted so to do by a desire to speak the truth, the love of truth being stronger with them than the love of gain or benefit.

There is another rule of evidence recognized in our municipal courts; that is, that witnesses must ordinarily be able to speak to facts within their own personal knowledge and are not allowed to make their statements based upon hearsay. All hearsay is not necessarily false, but is of less weight and entitled to less credit than direct primary evidence, and from its very nature it is not subject to the legal tests of the oath and cross-examination. Another ground of exclusion is, that the law presumes better evidence to be in existence, where the facts deposed to are of recent date, and within the memory of witnesses living. To this rule there are, however, numerous exceptions, founded upon the necessities of the case; thus, where better evidence is not presumed, owing to the lapse of time, to be in existence, hearsay evidence, like secondary evidence, where primary evidence is lost or destroyed, is receivable, and is often resorted to, especially in proof of traditionary or historical facts.

Testing the credibility of the authors of the sacred Scriptures by the rules of evidence recognized in our civil courts, it is apparent that instead of being compelled, if they were the subjects of legal investigation, to prove their authenticity, we would be able to devolve the burthen of proof upon the party attempting their impeachment. Their existence and their coming from the proper repositories, *prima facie* and in legal contemplation, is sufficient to establish the fact, and as we have previously seen, a *prima facie* case or presumption is always deemed in law sufficient, until it is overcome by countervailing testimony. The Scriptures are well supported and authenticated by concomitant and corroborating circumstances, and have never been successfully impeached; although in one form or another they have been successively attacked by the infidel world; and in making such attacks it has been contended that the rules of evidence add no additional strength or support to their authenticity; for the reason that such rules are drawn from the Scriptures themselves and therefore they are not fair and infallible tests. Infallibility is not claimed for them; but what is claimed is, that the experience of mankind has demonstrated their utility. We receive the accounts that are given us by profane historians of the existence of the Egyptians, Persians, Assyrians, Greeks, and Romans, including the account of their manners, customs, laws and religion, on the

faith of historians, without any other corroborating circumstances, except such corroborations as are found in the Bible.[1] There is a strange inconsistency manifest in infidel criticism; with reference to corroboration, they are willing to allow the Scriptures to corroborate profane history, but they are unwilling to permit profane history to corroborate the Bible. In point of fact, however, profane history corroborates the Bible, and the Bible corroborates profane history.

We call attention to the writings of the four evangelists, as they are termed, each one of whom states some things in the same series of facts that are corroborated by the others; two of whom at least, according to their own statement, were eye-witnesses of the facts they have solemnly recorded, or at least of many of the facts. Conceding for the sake of the argument that the other two were not present and did not witness the events and miracles they record, still their statements are made with reference to events publicly known, in which time, place, and persons are given with minutiæ of detail. Their Gospels would at least be entitled, viewed from a legal stand-point, to historical credibility, for the reason that they were contemporary with the events which they record, and St. Luke says, in the introduction to his Gospel, that he had a perfect knowledge of the facts; how he obtained them, whether by being present, or whether by hearing them repeatedly narrated by those who were present and witnessed them, or whether by inspiration, is a matter of little importance in this view of the question.

When we come to compare his statement and Gospel with those of the other evangelists, it will be found that each one of those Gospels or the principal incidents are corroborative the one of the other in every essential particular. If Christ raised the dead, healed the sick, cleansed the leper, calmed the elements, opened the eyes of the blind, and unstopped the ears of the deaf,

[1] Historical facts of general and public noteriety may indeed be proved by reputation, and that reputation may be established by historical works of known character and accuracy, but evidence of this sort is confined in a great measure to ancient facts which do not presuppose better evidence in existence, and where from the nature of the transaction, or the remoteness of the period, or the public and general reception of the facts a just foundation is laid for general confidence. *Morris et al.* v. *Harmer's Heirs*, 10 Curtis, Dis.; 1 Starkie's Evidence, pp. 60–64.

drove out the money changers from the court of the temple, overthrew the seats of those who sold doves, confounded the Jewish doctors of the law, silenced their priests, was arrested, tried, sentenced to death, crucified, if darkness was over the land for the space of six hours, and the veil of the temple was rent, if he was buried, and on the third day rose from the dead and appeared to the eleven disciples, and afterward to about five hundred, it will not do to believe that these facts were not so well and publicly known and so authentic, not only in their essential features, but in all their minutiæ of detail, that it would have been impossible to write any history or account of those events which, if false or incorrect in any particular, would not have at once been detected, provided such accounts were written during the memory of living witnesses.[1]

That there are slight discrepancies in the statements of the four evangelists has not escaped the attention of infidel critics, who have so closely analyzed every section and verse and noted every apparent discrepancy, so that in the Bible they pretend to estimate the number at not less than 120,000; the most of these, however, occur in the Old Testament Scriptures, and a very large proportion consist of differences of spelling and isolated aberrations of scribes, and of the remainder comparatively few are sufficiently well supported to create reasonable doubt. To the legal mind those slight discrepancies raise a strong circumstantial presumption in favor of their genuineness and in favor of the integrity and veracity of the authors. No two witnesses, however honest and however capable, viewing the same transaction, agree as to the exact minutiæ of detail. If the Gospels had been written by the same author, or if they had been care-

[1] It seems reasonable to conclude that the autographs perished during that solemn pause which followed the apostolic age, in which the idea of a Christian canon, parallel and supplementary to the Jewish canon, was first distinctly realized. In the time of the Diocletian persecutions, A. D. 303, copies of the Christian Scriptures were sufficiently numerous to furnish a special object for persecutors, and a characteristic name to renegades who saved themselves by surrendering the sacred books. Partly, perhaps, owing to the destruction thus caused, but still more from the natural effects of time, no manuscript of the New Testament of the first three centuries remains. Some of the oldest extant were certainly copied from others which dated from within this period; but as yet no one can be placed further back than the time of Constantine. Smith's Bible Dic. p. 615.

fully revised and corrected, the one by the other, these apparent slight discrepancies would not be observable. An exact agreement might induce the belief, founded on human experience, that there was collusion between them in giving their testimony, and instead of imparting credence to the Gospels it would obviously tend to discredit them. The teachings of Christ were not private, nor were his miracles privately performed, neither were the incidents recorded in the Gospels fixed as taking place in some obscure, remote, or rural district, away from the principal cities of Judea and Samaria; on the contrary, the great events that are ascribed to him by the evangelists are described as taking place in Jerusalem, Samaria, Capernaum, and other principal cities. When he was inquired of by the high-priest with reference to his teachings and doctrine his reply was, Ask them that heard me. He is represented as teaching openly in the temple, in the synagogues, in the streets, and along public thoroughfares. His miracles are also represented as having been publicly wrought. He came in contact with, and addressed, all classes, the rich and the great, as well as the humble and poor, the learned and the unlearned, the proud and haughty Pharisee and the skeptical Sadducee. Such was the publicity of his life, of his miracles, and of his ministration, that deception or falsehood with reference to them was impossible. The accounts given by those evangelists are therefore either substantially true in all essential features, or they are unworthy of judicial belief; there is no middle ground to occupy when viewed from a legal stand-point. A rule of evidence founded on experience is that where a witness knowingly and willfully deposes to a falsehood in any material matter, he is not worthy of credit, and courts of justice under such circumstances uniformly where such witness is not corroborated by other competent and reliable evidence, reject the testimony. The evangelists have, therefore, no room for presumption of innocence if their testimony is partially false; they record the facts as being within their own personal knowledge, and not only within their own personal knowledge, but within the personal knowledge of thousands of others. Thus, when Christ miraculously fed five thousand in the desert, the whole multitude comprehended the fact; when he turned the water into wine at the feast of the marriage in Cana of Galilee, all the guests assembled to

witness the ceremony knew that a miracle had been wrought. When he called Lazarus from the dead the Jews are represented as standing around witnessing the display of divine power. When he opened the eyes of the blind man by anointing them with clay and sending him to the pool of Siloam to wash and receive sight, a miracle is represented as having been the theme of discussion by the officers and priests that ministered around the temple.

The Jewish Church, or Judaism, is described by the evangelists as being alarmed at the progress that his ministry, and the display of divine power so repeatedly witnessed by them had made; and because thereof they sought occasion to entrap him so that they might bring an accusation against him. Therefore, as if for information, they inquired whether it was lawful to pay tribute to Cæsar, hoping that he would call in question the authority of the Roman government, and by that means secure his condemnation. The principal men of the nation are charged by the evangelists as having entered into a conspiracy against Christ to put him to death without cause. For, according to Josephus, he was a good man.[1]

If all these statements were false, and if the charges contained in the Gospels that the Jews wickedly conspired against him were untrue, they would have met with immediate and successful refutation. Is it possible that Christ could have been brought before the Jewish council, sent by them to Pilate and by Pilate to Herod, and from Herod back to Pilate, condemned, crucified, and when dead, buried, and after lying in the grave three days to have risen from the dead, and especially with all the attendant circumstances, without all Jerusalem and all the regions round about, and the strangers that were in Jerusalem at the time

[1] "Now there was about this time Jesus, a wise man, if it be lawful to call him a man, for he was a doer of wonderful works, a teacher of such men as received the truth with pleasure. He drew over to him both many of the Jews and many of the Gentiles. He was [the] Christ. And when Pilate, at the suggestion of the principal men among us, had condemned him to the cross, those that loved him at the first did not forsake him, for he appeared to them alive again the third day, as the Divine prophets had foretold these and ten thousand other wonderful things concerning him; and the tribe of Christians so named from him are not extinct at this day." Josephus's "Antiquities of the Jews," p. 364.

from Parthia, Media, Mesopotamia, Cappadocia, Phrygia, Pamphylia, Egypt, Libya, Rome, and Arabia, knowing the facts?—for it is fair to presume that all of these nations and others were represented there at the time.

Not only the publicity of the events recorded and the number of witnesses that are represented as being acquainted with the facts add strength and impart verity to the statements, but they are corroborated by others.[1]

Paul, who was by birth a Roman citizen, a man of wonderful powers of intellect, and originally a man of ambitious views, born at Tarsus, educated in Jerusalem in the school of Gamaliel, a distinguished Jewish rabbi, after having commenced a course of persecution suddenly embraces the new doctrine and devotes the balance of his life to teaching and writing in its vindication, surrendering all hope of political or other aggrandizement; traveling from place to place, establishing Churches, confirming and encouraging those that had been established by others; declaring in the presence of Agrippa, Festus, and others, that he had been miraculously stopped on his way from Jerusalem to Damascus; that he had seen a vision accompanied by a light above the brightness of the sun, and that he had heard a voice, and that some of those things were heard and seen by those that accompanied him; that he was stricken with blindness, and in that condition led by those that accompanied him to Damascus; that his blindness was miraculously cured, giving the circumstances with minute detail. He had made this statement twice, at least, before, and he now makes it to King Agrippa, with that degree of apparent earnestness that carried conviction to the mind of this distinguished Roman, that Paul at least was free from the charge or suspicion of an attempted imposition. Others have borne testimony to the statements of the evangelists, and

[1] "Nero, in order to stifle the rumor (as if he himself had set Rome on fire), ascribed it to those people who were hated for their wicked practices and called by the vulgar, 'Christians;' these he punished exquisitely. The author of this name was Christ, who, in the reign of Tiberius, was brought to punishment by Pontius Pilate, the procurator." Tacit. Annal., Lib. 15, cap. 44. Written about A. D. 110.

About A. D. 147, Just. Mart. Dialog. cum Trypho, p. 230, "You (Jews) knew that Jesus was risen from the dead and ascended into heaven, as the prophecies did foretell was to happen."

if their statements were made as represented within the life of living witnesses, who were not only able but willing to contradict them if they were false, the entire New Testament, if not true, would have been overthrown and discredited as unworthy of belief.

There are several methods known to the law of discrediting testimony, the most effective of which is by showing that the testimony is conflicting and irreconcilable with itself; that is, that the different accounts given by the witness can not be harmonized. There is always a consistency about truth that is never found when a witness is deposing to falsehood. Truth is like a chain with many links, when drawn out it will be found to be a united and consistent whole. With falsehood it is otherwise; here and there a connecting link will be missing, neither will the witness, when fabricating his testimony, tell the same story the second time, but an observable effort will be apparent to harmonize the different statements. Now let us test the statements of Paul made on three several occasions, with considerable time intervening, and each time under different circumstances, and what is the result? Slight discrepancies are apparent, yet no infidel critic has ever attempted in this narrative to involve the apostle in even a supposed contradiction as to any of the material facts. If not contradicted according to the rule of law before referred to, his testimony is entitled to credit. Let us analyze it and see if it was not open to criticism if his statements were untrue. Was it true that he was commissioned by the chief priests to go to Damascus, arrest and bring bound unto Jerusalem the believers in Christ? Was it true that he started on his way and took with him a *posse*, the better to execute his purpose? Was it true that on the way, when he was near to Damascus, he saw a light that shone around about him, and that he heard a voice saying unto him, "Saul, Saul, why persecutest thou me?" Was it true that he fell to the earth and inquired "Who art thou, Lord?" and that the answer came, "I am Jesus whom thou persecutest?" If these facts did not occur, they were of such a character that they were of easy contradiction. If no authority was conferred by the high-priest upon Paul; if no *posse* of men accompanied him from Jerusalem to Damascus; if he was not stricken with blindness by the way; if he was not led by the

hand and brought into Damascus, the refutation was easy to be made out. On the contrary, if he did accept a commission; if he did start to go to Damascus with the avowed purpose of executing such authority, even if he was only a man of ordinary integrity—and the fact of his being intrusted with the commission is *prima facie* evidence of at least that—if he failed to obey the authority reposed in him; if his life from that period on underwent a radical change; if he sought the communion and fellowship of those that he previously persecuted, these facts, with all the attendant circumstances, add weight to his testimony; and if his statement is accepted as true—and there is no reason to discredit it unless we deny all communication or channels of communication between heaven and earth—then his testimony becomes strongly corroborative of the testimony of the four evangelists.

Another link in this chain of legal evidence tending to establish the authenticity of the Scriptures is, that at the time Jesus Christ established his Church on earth, Israel and Judea were subject to Rome, and Rome was the seat of pagan idolatry. It follows that the establishment of a new religion, and especially one which restricted them in their religious abominations, would neither receive Roman patronage nor Roman protection. Even less favor was shown, and less was to be expected, from Judaism, insomuch that Paul, when brought before Felix, deliberately appealed from the mock justice of Judea—for he had the offer to go to Jerusalem and there be tried—to the justice of Cæsar. The religion of Jehovah, established and successively recognized by the Jews, had been by their priests and public officials so prostituted as to render it a matter of commerce, and hundreds and thousands, it may be, in and about Jerusalem, were living off the gains of the temple. Any new system that put their emoluments and livings in jeopardy would meet with the same hostility that Paul met with in the city of Ephesus, when the whole city cried out, "Great is Diana of the Ephesians." Under these circumstances, confronting Jewish hate and Roman scorn, amidst the scoff of the multitude, right in the city of Jerusalem, shortly after the crucifixion, the twelve met, Matthias having been selected instead of Judas Iscariot, and there publicly preached in his name, and declared the fact of the death, resurrection, and

ascension of Jesus Christ, and that he was the promised Messiah of the Jews, and that they were the chosen witnesses of his miracles. In one day, in the presence of strangers and sojourners from almost every nation of the globe, or all making any pretension to civilization, they organized and established a Church, and from that time forward there has never been a day in which there have not been organized Christian bodies.

In view of the opposition and power opposed to the spread of Christianity; in view of the persecution immediately succeeding; in view of the trials and hardships and privations that these men were subjected to; in view of the fact that prisons, dungeons, stocks, stripes, hunger, nakedness, and death awaited them,[1] what motive could they have had to misrepresent the facts? Misrepresentation deprived them of an earthly inheritance, and gave to them no expectation of a better inheritance in a future state. Their doctrines and professions are directly opposed to a belief in their want of veracity. Falsehood, in common with all other crimes, was by them denounced and held in just abhorrence.

The Scriptures abound with particular reference to numerous historical characters about whose existence, power, and authority, as public officials and as heads of governments, there never has been, and is not now, any question. It is a conceded fact, supported by such an author as Josephus, that there was, about the time of the birth of Christ, a certain man who assumed regal power over Judea, called Herod the King, and that he reigned over Judea for a period of about thirty-seven years; that he was a man of unlimited ambition and cruelty so that the account given in Matthew that he commanded all the male children in Bethlehem to be put to death is rendered probable, especially when we take into consideration that it was the firm belief of the

[1] James was a wonderful person, and so celebrated by all others for righteousness that the judicious Jew thought that the putting of him to death was the occasion of the siege of Jerusalem, which came on presently after his martyrdom, and that it befell them for no other reason than the impious act they were guilty of against him. Josephus, therefore, did not refuse to attest thereto in writing, by words following: "These miseries befell the Jews by way of revenge, for James the Just was the brother of Jesus that was called Christ, on this account, that they had slain him who was a most righteous person." Hist. Eccl. Lib. 1, Cap. 11.

Jewish people over which he reigned, founded upon the prophecies of the Old Testament Scriptures, that there should be born about that time in Bethlehem one who was to become the king of the Jews, and that through his power the Jews would be enabled to throw off the Roman yoke. It is related by the evangelist, Matthew, that before this cruel sentence could be executed Joseph, the husband of Mary, was warned in a dream of the approaching peril, and fled with the infant Jesus and his mother into Egypt, and remained there until after the death of Herod. The fact that no mention of this cruel edict is made in profane history is easily accounted for upon the hypothesis that the profane historians that were contemporary with him, either from fear or favor omitted its mention, and because it had no political significance, and the act in its character was so unworthy of a great name.

After the death of Herod, Archelaus, whom he appointed by his will his successor over Judea, succeeded in the room of his father as king over Judea. The other parts of Herod's dominions he divided between his sons Herod Antipas as tetrarch of Galilee, and Philip as tetrarch of Trachonitis, and they exercised authority as tetrarchs in the fifteenth year of Tiberius Cæsar. Their authority was never fully recognized, and Archelaus was appointed by the Roman government ruler over Judea and Idumæa, with the title of ethnarch, the dignity of king being at the time withheld. Soon after, however, the title of king was assumed by Archelaus; this accords with the account given by Josephus, and fully corroborates the statements contained in the Gospel of Matthew. True to his ancestral blood, Archelaus proved to be a cruel and tyrannical prince, whom the favor of Claudius and Caligula had raised to regal authority. When in power it is said that in order to conciliate the Jews he stretched forth his hands to vex certain of the Churches and put to death James, the brother of John. Afterwards he arrayed himself in royal apparel or in garments made of silver, so that the reflection of the rays of the sun falling upon the silver gave him a majestic appearance; thereupon the people gave a great shout, and at the conclusion of an oration delivered by him, they declared that his was the voice of God. Immediately, St. Luke declares, "the angel of the Lord smote him, because he gave not

God the glory, and he was eaten of worms and gave up the ghost."

If this statement made by St. Luke was not true as it related to a public matter and to a public official where thousands are represented as being present, it never would have obtained credence. Yet no historian has attempted to contradict the fact, but in all essential particulars the account given by St. Luke has received the historical indorsement of Josephus. The history of this family is so intimately interwoven with the history of the early Christian Churches, and the circumstances recorded in profane history are corroborative of the authenticity of the New Testament Scriptures, that we propose briefly to trace them a little further. It is related that Herod had three daughters, Bernice, Mariamne, Drusilla, and that the last mentioned of them was married to Felix, who was appointed governor of Judea on the death of Herod; that Felix was tyrannical, avaricious, and oppressive. This exactly accords with the account given of him by St. Luke. Such a character would naturally have called forth the appeal of Paul in the memorable defense made by him before Felix, in which he reasoned, with such vigor of intellect, of righteousness, temperance, and judgment to come, that Felix trembled; yet, notwithstanding his compunction of conscience, his venality kept pace with his sense of right, and he was ready to barter away justice for money.

Another character that stands forth more conspicuous than all others in the New Testament Scriptures, on account of the part that he took in the crucifixion of Jesus Christ, is Pontius Pilate, who was appointed about A. D. 25, or in the twelfth year of the reign of Tiberius, procurator of Judea. It is said that one of his first acts was to remove the headquarters of his army from Cesarea to Jerusalem, together with their idolatrous standards; which met with a strong and persistent opposition from the Jews and almost drove them into insurrection. They remonstrated with him, and their remonstrances were met with barbarous cruelty and death.[1]

[1] "Pilate, the procurator of Judea, removed the army from Cesarea to Jerusalem to take their Winter quarters there, in order to abolish the Jewish laws; so he introduced Cæsar's effigies, which were upon the ensigns, and brought them into the city, whereas our law forbids us the very making of images; on which

This treatment instead of subduing only strengthened the Jews in their determination, for they chose death rather than submission to an idolatrous innovation upon their religion. Pilate finally found himself compelled to yield, and to remove his idolatrous standard from Jerusalem back to Cesarea. In this conflict, and in others in which he engaged with the Jews, he treated them with great barbarity; he even put to death certain Galileans and mingled their blood with their sacrifices, but he learned a lesson, and we see the result of it in the clamor of the Jews for the crudifixion of Christ. Pilate, notwithstanding his conscious convictions of the innocence of Christ, which he more than once declared, publicly delivered him to be crucified—an act unworthy of any procurator, governor, or judge, but nevertheless an act that was in perfect keeping with the character of the man. There are some corroborating circumstances connected with the history of Pilate that add great weight to the account given by the evangelists of the crucifixion of Christ. At that time Pilate resided at Cesarea, and had the headquarters of his army there, but it was his custom upon the occasion of the great feasts of the Jews, which brought together the principal men of the Jewish provinces to celebrate their feasts, in order to enforce quiet and to prevent insurrections, temporarily to remove his headquarters to Jerusalem. This accounts for Christ being

account the former procurators were wont to make their entry into the city with such ensigns as had not those ornaments. Pilate was the first who brought those images to Jerusalem and set them up there, which was done without the knowledge of the people because it was done in the night time; but as soon as they saw them, they came in multitudes to Cesarea and interceded with Pilate many days that he should remove the images; and when he would not grant their requests because it would tend to the injury of Cæsar, while yet they persevered in their requests, on the sixth day he ordered his soldiers to have their weapons privately while he came and sat upon his judgment seat, which place was so prepared in the open place of the city, that it concealed the army that lay ready to oppress them; and when the Jews petitioned him again, he gave a signal to the soldiers to encompass them round, and threatened that their punishment should be no less than immediate death unless they should leave off disturbing him and go their way home, but they threw themselves upon the ground and laid their necks bare, and said that they would take their death very willingly rather than the wisdom of their laws should be transgressed; upon which Pilate was deeply affected with their firm resolution to keep their laws inviolable, and presently commanded the images to be carried back from Jerusalem to Cesarea." Josephus's "Antiquities," p. 363.

brought before Pilate in the palace of Herod; it also accounts for the Jews, contrary to all their previous history, insisting upon the crucifixion taking place at the feast of the Passover, for it was only during those feasts that Pilate had his head-quarters at Jerusalem, and they feared that if he should return to Cesarea without condemning or assenting to the condemnation of the Son of God, they would not be able to sustain their accusation against him, and to secure by the clamor of the mob his conviction.

Another strong corroborating circumstance as proof that the Scriptures were written in the first century is, that they refer not only to historical men and women of that period, but they make special reference to certain religious sects into which the Jews were divided, and give not only the name of each sect, but also the peculiar tenets and belief, and the doctrines taught and entertained by each of such sects, which no impostor writing at a later period would venture to have done, even if the task had been possible; for it is evident from profane history and from Josephus, who wrote in that century, that, during the latter part of the century there were great political, social, military, and religious revolutions, during which the temple was destroyed, and the nationality of the Jewish people obliterated, so that they have had from that time forward no political or historical national recognition. No event could so effectually have wiped out all traces of religious difference between the different sects or tended to unite and consolidate the entire people into one religious sect, as the destruction of their temple and the overthrow of their nationality; for from that time forward the Jews have been scattered over all the nations in Christendom, and have been subjected to persecutions and reproaches, yet notwithstanding they have retained their peculiar distinctive character as Jews. All traces of their divisions into sects have disappeared.[1]

[1] "In all matters relating to the temple at Jerusalem and to the religion of the Jews there is a remarkable agreement between the authors of the New Testament and Josephus, who had in person beheld the sacred edifice, and was himself an eye-witness of the solemn rites performed there. Hence it is obvious that his statements are unquestionably more worthy of credit than the unsupported assertion of the Talmudists, who did not flourish until long after the sub-

Another strong corroborating circumstance in proof of the fact that the Gospels and Epistles were written in that period is, that they were early translated from the Greek into different languages, as the Arabic, Armenian, Ethiopic, Gothic, and Latin, and these were in use before the time of Jerome; and to this day the Greek or Septuagint version is used in the Oriental Churches. All of these different translations claim the same origin, assert the same authorship, and agree as to the date of their commencement, and substantially agree as to all the material facts. With this weight of historical recognition, it may be safely assumed that the Gospels were written and promulgated, generally known, and received as authentic, in the first century; and if so, it follows as a necessary legal conclusion, that the facts contained in them are true. There is direct internal evidence that these several books of the New Testament, were not written by the same authors. They profess to have been written by Matthew, Mark, Luke, John, Paul, James, Peter, and Jude. Their style and manner of expression is different, and so diversified that it would be impossible, subjected as these writings have been to keen analytical criticism by both pagan and infidel, to have escaped detection if there had been a conspiracy so wide and spreading in its tendency to palm off those Scriptures as genuine when they were merely mythical and the work of impostors. Besides, they profess to have been written and addressed to certain Churches and to certain persons for the purpose of being publicly read. Here we meet the same publicity of design that accompanied the teachings and miracles of Jesus Christ. One of

version of the city and temple and of the whole Jewish polity, both sacred and civil. A single instance out of many that might be adduced will suffice to illustrate the importance of this remark. The Talmudical writers affirm that the priests only killed the paschal lambs, but Josephus (whose testimony is confirmed by Philo), relates that it was lawful for the master of every family to do it, without the intervention of any priest, and they further relate that at the time of the Passover there were so many families at Jerusalem that it was utterly impossible for the priests to kill the paschal lamb for every family. In the New Testament we read that Jesus Christ sent his disciples to a private house that the Passover might be prepared by its possessor and by them without the presence of any priest, or previously taking the lamb to the temple. As the statements of Philo and Josephus are corroborated by the relation in the New Testament, they are undoubtedly correct." Lardner's "Works," Vol. 7, pp. 162–187.

those Epistles purports to have been addressed to the Christians at Rome, at that time Rome being the center of the heathen civilization of the world, with the best system of morals, the best rules of evidence, the most complete and thorough code of laws, with the profoundest philosophers, with the ablest and wisest men of the age belonging to the heathen world. The fact that this Epistle was written by Paul to Rome has never been successfully controverted; neither does the infidel world seriously question the fact that a body of Christians were at Rome at the time when this Epistle purports to have been written. The subject of the Epistle, in view of the condition of those to whom it was addressed, is peculiarly applicable, and affords strong and marked evidence of its authenticity. Were it otherwise, why should it contain so full and exhaustive a discussion of the doctrine of circumcision under the law, or circumcision of the heart and of the inner life through faith? Circumcision was not a Roman but a Jewish ordinance, which, in the preceding ages, had been the peculiar mark to designate the true worshipers of Jehovah from the heathen nations around; neither was this ordinance regarded with favor by the Gentile world. Hence, when Paul seeks to extend the doctrines of Christianity and the Cross to the heathen nations, he labors to impress upon them the important fact that outward circumcision availed nothing, and that they could accept Christianity without at the same time taking upon themselves this ordinance, and he presents this question in his Epistle to the Romans with a clearness and vigor of intellect such as was peculiar to his style of writing. The Epistle is just such a one as we might expect from so gifted and sagacious a mind to such a people, surrounded as they were with all the peculiarities of Judaism on the one hand, and heathenism on the other. This same argument of adaptation holds good throughout every Epistle written by Paul, and, in fact, throughout the entire Scriptures.

There are those who, like the experienced astronomer, have so closely and critically studied and analyzed the styles of the various authors, and become so well acquainted with the peculiar mold of mind and idioms of expression, that it would be impossible for authors to so disguise themselves that these scientific experts could not be able to identify them. The skilled and experienced adept in this department of science is usually able

to distinguish between the genuine and the spurious, and between that which was written at an earlier and that which was written at a later date. The manners, customs, modes of thought, and idioms of language, are constantly changing; new words are being coined and old ones becoming obsolete. Hence the task of tracing out these changes is less difficult than the superficial observer might be led to suppose. In this department there is every shade of difference, from marked sameness to the most minute circumstantial conjecture. Tested by these rules, how is it with Paul's letters to the Romans, to the Corinthians, to the Galatians, and to the Ephesians, to say nothing of his other writings? The experienced scientific scholar in this department, when he has once gotten the exemplar of his style in one of those Epistles in his mind has no difficulty in tracing his identity through each of the others.

In addition to this evidence that those Epistles were written and addressed to the several Churches, we have the circumstantial fact that such Churches were organized, and that they existed with distinct traditional claim to having been established by the persons in accordance with the accounts given in the New Testament. How long and to what extent tradition may be relied upon in the absence of contradictory facts in order to establish the authenticity of a claim of right, is nowhere settled and determined by legal adjudication.[1] The law, however, receives traditionary evidence as authentic when it has existed, as it is quaintly expressed by Blackstone, "time out of mind;" that is, for a length of time so that the memory of man runneth not to the contrary. It is a well established fact, that a large portion of what we receive as historical truths to-day is made up of public

[1] Historical facts of general and public notoriety may be proved by reputation, and reputation may be established by historical works of known character and accuracy. *Morris* v. *The Lessee of Harmer's Heirs*, 7 Peters, 554. (So in this State), viz., *Bogardus* v. *The Trinity Church*, 4 Sand. Chr. 633, 724. The Vice-Chancellor, speaking of evidence derived from public records, statutes, legislative journals, historical works, etc., says that it is "restricted as to historical evidence to facts of a public and general nature." There is, indeed, no doubt that it is strictly confined to facts of this sort. History is only admissible to prove history—that is, such facts as, being matters of interest to a whole people, are usually incorporated in a general history of the State or nation. *M'Kinnon* v. *Bliss*, 21 N. Y. 216.

tradition. It is also a familiar rule of evidence, that in proof of such facts by the declarant, who is not shown to have been interested, the naked declaration of such declarant is received as evidence of reputation or traditionary facts. There is another reason why tradition is strongly corroborative of the facts recorded in the several Epistles of the New Testament, and that is, that a deadly enmity existed in the mind of the Jews and in the mind of the pagan world against Christianity, and neither would have permitted an unfounded tradition to be transmitted from one generation to another, without an impeachment of its authenticity. Besides, there is no conceivable motive known either to the Christian or infidel world that would have prompted these Churches to establish and adhere to a tradition that was false.

There is a rule of law firmly recognized by our civil tribunals, that the continued and repeated assertion of a claim of right acquiesced in by others for a period beyond the memory of living witnesses is evidence that such a claim had a legal commencement—that it existed by right and not by wrong. Thus, where a corporation—whether a corporation sole or aggregate—exercised a certain franchise and had exercised such franchise time out of mind, it was held that the commencement of such exercise was legal, or at least presumed to be so,[1] and existed by royal grant, and that although there is now no evidence of the existence of such royal grant except that contained in the repeated assertion by the corporation or by its members of the traditionary claim and acquiescence of the public in such claim under such circumstances is sufficient conclusively to establish the grant, and this upon the legal presumption that others adversely interested would have disputed such right and would not have acquiesced in it unless the same had been legally authorized

[1] The general rule with regard to prescriptive claims is, that every such claim is good if, by possibility, it might have had a legal commencement. 1 Term Rep. p. 667.

Immemorial usage, from time whereof the memory of man runneth not to the contrary, was formerly held to be when such usage had commenced not later than the beginning of the reign of Richard I. But as in most cases it is impossible to bring proof of the existence of any usage at this early date, the courts were wont to presume the fact upon proof only of its existence for some reasonable time back. *Bright* v. *Walker*, 4 Tyr. p. 509

in its commencement. At the time when the Gospels and Epistles purport to have been written, the number that could read and write was comparatively few. The science was not then, as now, in use among the great masses of the people, and when these Epistles were written they were written with directions to be read in the Churches to which they were addressed. Some of them were written to correct certain abuses that had gotten into the Churches, and to admonish them of certain things tolerated in the Churches which were disgraceful even in the heathen world. Especially is this true of the Epistle addressed by Paul to the Church at Corinth, in which he complained that the Church tolerated a man to have his father's wife, and then, assuming apostolic authority, he commands the Church to discard him, and not even to keep company with such a one; but afterwards, hearing of the affliction and deep anguish that this had caused the Church, and even the offender, he addressed to them a recommendation for the forgiveness of the offender. All this is utterly inconsistent with the belief that this Epistle is not genuine, and that these characters are merely mythical ones. This is only one of the many ear-marks of authenticity by reference to a minutiæ of detail that may be found in these Epistles, and which are never found in spurious productions.

We come now to the consideration of another evidence of the genuineness of the Scriptures. In moral evidence, especially, we judge of the existence of a fact by its concomitants. Now, let us apply the rule as an aid in this investigation. By reference to the known laws of nature, we find that there are no systems, methods, or sciences unfolded, and that there is no classification; for illustration, we see here a plant and there a flower; some adapted to growing upon the mountains, some in the valleys, some in the forests, and some in the water; but there is no unfolding of what is the essential nature and property of these flowers and plants. Each, however, is peculiarly adapted to the situation in which it is placed, and they altogether afford the material and substance out of which a system or science may be formed. The work of showing the relation which one of these sustains to the other, and the property of each, belongs to man. The same principle, not only of adaptation but of material substance, is observable in the Bible.

If we have succeeded, in this brief article, in establishing the legal authenticity of the New Testament Scriptures, and in devolving the burthen of proof upon those who call them in question, we can easily from them infer the authenticity of the Old Testament Scriptures, first, from the fact that the one is in harmony with the other, and is simply an unfolding and fulfillment by the one of what is contained in the other. Without attempting the task of tracing out the prophetic references commencing in the Book of Genesis and ending with the last of what is called the lesser prophets, there is no difficulty in reaching the conclusion that the entire Old Testament Scriptures were designed to be, apart from their historical accounts, mere types, reflecting the coming and ushering in of a new and better dispensation, founded upon clearer principles and more substantial promises. In addition to this, almost every Book of the Old Testament that is now regarded as canonical, is referred to with that degree of certainty which leaves no room for doubt that if the one is genuine the other must be also.[1]

The internal evidence that the Bible itself affords of genuineness aside from all extraneous considerations is sufficient to

[1] Recitals do not bind strangers or those who claim by title paramount. It does not bind persons claiming by an adverse title, or persons claiming from the parties by a title anterior to the date of the recited deed. Such is the general rule. But there are cases in which such a recital may be used as evidence even against strangers. If, for instance, there be the recital of a lease in a deed of release, and in a suit against a stranger the title under the release comes in question, then the recital of the lease in such release is not, *per se*, evidence of the existence of the lease; but if the existence and loss of the lease be established by other evidence, then the recital is admissible as secondary proof, in the absence of more perfect evidence, to establish the contents of the lease; and if the transaction be an ancient one and the possession has been long held under such release, and is not otherwise to be accounted for, there the recital will, of itself, under such circumstances, materially fortify the presumption from lapse of time and length of possession of the original existence of the lease. Leases, like other deeds and grants, may be presumed from long possession which can not otherwise be explained; and under such circumstances a recital of the fact of such a lease in an old deed is certainly far stronger presumptive proof in favor of such possession under title than the naked presumption arising from a mere unexplained possession. Such is the general result of the doctrine to be found in the best elementary writers on the subject of evidence. *Carter* v. *Jackson*, 9 Curtis, U. S. Dec. 6; 1 Phillips on Ev. p. 411; 1 Starkie on Ev. part 2, 301; Matthews on Presumptions, 195–204; *Mayor, etc.*, v. *Blamire*, 8 East, 487.

establish its authenticity, especially when we take into consideration the morality taught in the New Testament, as compared with the morality of the age in which it was written. The Jewish nation in that age, if not the most cultured, and if not further advanced in the arts and the sciences than the Greeks and the Romans, excelled them in virtue. Yet what kind of an estimate should be placed upon the morality of a nation who, for offices of kindness, healing their sick, cleansing their lepers, and doing good in every conceivable form, rewarded such merit at the judgment hall and the crucifixion? It is seldom that a writer or a philosopher in endeavoring to introduce a new system or set up a new standard ventures to set up such standard in opposition to or above the public standard. The restraints of public opinion are not easily thrown off. This would be especially true if he who attempted the experiment was a mere adventurer uninfluenced by convictions of duty. How does the standard of morality of the Jews compare with the standard erected by the New Testament Scriptures, when viewed simply with reference to its adaptability of our wants and the well-being and ultimate good of the race of mankind? Whoever taught, except the Son of God, "love your enemies," "do good to them that hate you, and pray for those that despitefully use you?" Whoever taught, besides Christ and his apostles, that we should lay aside all hatred, guile, and hypocrisy, rendering evil for evil to no man, but, on the contrary, rendering good for evil? Where do you find a doctrine inculcated outside the teachings of the Bible, that we should feed the hungry, clothe the naked, and provide for the unfortunate and destitute? These are doctrines that are peculiar to the teachings of the New Testament Scriptures.

We do not propose to discuss the question of the morality of the Bible from a psychological stand-point, or to claim for it that the theory of morals inculcated in it is imbedded in our natures; but what we do contend for is, that all men, without reference to their condition in life, recognize a distinction or difference in actions, and whether we refer this difference to our ordinary intellectual faculties, or to some of our emotional susceptibilities, or to a mixed faculty, or to something peculiar and distinct, is a matter of no moment. If there is such a thing as a standard of morals, it must have been set up by some authority either human

or divine, and that authority must have been recognized and acquiesced in by the people, in order to give it efficiency and effect. Two standards of morals are recognized as existing in the world;—the one is the standard set up by human authority and assented to by Cæsar's government or by the governments of the world which, to some extent, is restrictive of individual action or conduct, but in other respects it gives countenance to sin and wrong; the other is the one that is enjoined in the New Testament Scriptures. Whether the one or the other is most promotive of man's happiness, the well-being and good order of society, can only be determined by comparison. We read in profane history as well as in the Bible that without any regard to justice or right or without any previous provocation, one nation of antiquity made war upon another. Thus the powerful Assyrians having discovered the vast wealth of the temple sent an army to take it without any claim of right. Rome compelled the nations surrounding her, and those that were remote, to pay tribute, and to aid her in her wars. Upon what principle was this right asserted? It was purely upon the principles of might that the strong had the right to oppress the weak. Instead of cities and provinces growing and reposing securely in the moral sense of the nations, they engaged in walling in their cities and building strong fortresses and towers, and nearly the whole people and all the different nationalities were given up to invasions, predatory wars, or preparations to repel invasions.

The doctrine of the New Testament has made a change not only in our social, and domestic, but in our national polity. There has been recently in Europe a convention of the different nationalities with a view of amicably adjusting the differences between Russia and Turkey. The whole civilized world, under the influences of Christianity now seek to avert the barbarisms of war, and the code of international law has grown up under the teachings of the New Testament Scriptures, changing the law of might into the law of right; under a human standard of morality men were divided into two classes,—a barbarous aristocracy and a degraded peasantry, beasts of prey and beasts of burden. Greece had her Olympian chariot course and Rome her Flavian amphitheater, but what availed these in the enlightenment and elevation of the masses, or in bringing them up into thinking,

intellectual, and moral beings. Christianity, unlike any other system of religion, permeates the masses, meets the wants and supplies the demands of our nature; in other words, not only secures the greatest good, but it supplies the necessities of all. It is true that since the Church was established at Jerusalem, at Rome, at Corinth, and at Ephesus, it has in many respects, in those places and in others, been deeply corrupted by the superstitions and by the philosophy of the heathen nations surrounding it. It is true that she has accorded admission to doctrines borrowed from ancient heathen schools and from heathen temples, Grecian ingenuity, Gothic ignorance, Roman policy. Syrian asceticism has contributed to deprave her, yet, notwithstanding the influence of barbarism and idolatry, she has retained enough of the purity of the Gospel to make a marked influence upon the destinies of the nations. Christ found the world in a state of grossly bad morals, destitute of enlightened public opinion, oppressed by idolatrous priestcraft, and governed by brute force, with no thought for the well-being of the people. One of the strongest evidences of the genuineness of the Bible is that which was given by Christ to John's disciples, as a message to bear back to their master, to the effect that the poor have the Gospel preached to them. For more than eighteen centuries this grand thought, founded upon the teachings of the Scriptures, that all men are to be regarded as politically and religiously equal, has been steadily gaining ground, and is now the chief corner stone of more than one political organization. This of itself, considering the circumstances, is strong proof of the authenticity of the Scriptures. In legal evidence, from the establishment of the existence of one state of facts, we can reasonably and legally infer another. If the Bible is receivable in evidence supported by sufficient ancillary proof, then it follows that the statement contained in it or its recitals are evidence, and reference has been made to the principles of evidence external and internal upon which it is based. There is, however, no evidence of many of the truths contained in the Bible except such as are contained in its recitals. Thus, is man immortal? is there a future state? shall we live again? and if a future state of being, what is the character of that state? one of happiness or misery? is our future state of being dependent upon our actions here? has virtue any reward

hereafter, or vice any punishment? these are questions that strongly urge upon our consideration the necessity for a revelation, for while there are legal evidences of the authenticity of the Scriptures, and while there is proof that the Scriptures come from their proper repositories, there is no evidence of man's immortality except what may be gleaned from the analogies of nature, the strong desire for a future state implanted in the human heart, and from the express declaration of revelation. If these facts had been within the compass of legal evidence capable of being understood and comprehended, then the argument based upon the necessity of the Scriptures would be done away with, and actual truth substituted for faith which is well and aptly defined by the Apostle Paul to be the evidence of things not seen, the existence of which is established by things that are seen, that is, by the revelation that God gave to us, that like as Christ was raised from the dead, so should we also be raised, not with corruptible natures, but with incorruptible, for this mortal shall put on immortality and this corruption shall put on incorruption.

This brings us to the consideration of the question, Are the miracles recorded in the Bible, and the death and resurrection of Jesus Christ, sufficiently authenticated to challenge our belief? If they are not, then, according to a familar and well recognized rule of evidence, the whole Scriptures are unworthy of credit. The statements are of facts (not hearsay) detailed by witnesses. The miracles were performed, if performed at all, in public, and not in private. The crucifixion is represented as taking place in the presence of a vast multitude, and was known to the whole city of Jerusalem and to all the strangers and sojourners there. The resurrection of Christ was equally as publicly known and as well authenticated as his death. If he performed no miracles; if he did not subdue the elements, control disease, conquer and cast out evil spirits, then the whole Bible, with all its superior morality, with all its adaptation to our wants and necessities, with all our hopes of immortality inspired by it, with every incentive to a virtuous life presented by it, is a mere illusion. When John, from his prison, sent his disciples to ask Jesus, of whose miracles and fame he had heard so much, "Who art thou?" he said to them, "Go show John again the things that ye hear and see, how the blind receive their sight, the lame walk, the lepers are

cleansed, the deaf hear, the dead are raised up, and the poor have the Gospel preached to them." If none of these miracles were performed, then it is in vain to talk about Jesus Christ being a good man, much less about his being the Son of God. If none of these miracles were performed he was guilty of dissimulation in sending this message to John. No deceiver, no Egyptian magician, no Chaldean astrologer, was ever guilty of more deliberate falsehood or baser imposition. But in favor of the miracles he performed we place in the scale, as we have legally the right to do to balance the improbabilities of miracles, the purity of his life, the adaptability of his doctrines to our wants, the confusion of his enemies, and the certainty founded on direct and positive proof by eye-witnesses that miracles were performed—not one or two in the obscure and remote districts, away from the principal central cities, but numerous ones all over the land—performed in the presence of his enemies, in the presence of priests and of Levites, of lawyers and doctors, of Jewish proselytes and strangers from every country that had any intercourse with the Jews, so that the knowledge of these miracles was carried wherever they went—whether to Rome, Athens, or Corinth; whether to Macedonia, Spain, or Ethiopia. It is in vain to oppose the truth of the performance of miracles by the simple assertion that they were improbable, or were not in accordance with the previously received opinions of mankind. There are many things that appear to be improbable before they are performed, about which men might have been more skeptical than of the performance of miracles. What to one mind is improbable to another mind, more highly gifted, may not only appear probable, but may be capable of actual mathematical demonstration. Thus the King of Siam rejected the statement of the Dutch embassador that in his country water sometimes congealed into a solid mass, for it was at variance with his own experience and with the experience of all others with whom he had come in contact. Before the age of steam, its agency as a propelling power appeared improbable; before the time of the discovery of the electric telegraph—the art of printing at a distance—men might well have said that lightning was incapable of being employed as an agency for the communication of thought, and men might well have said, as Job did when the Lord inquired

of him if he could send the lightning of heaven to go and say Here we are, that it is too wonderful for me, but now who doubts that both of these agencies can be, and have been, utilized? So we might well doubt the existence of miracles if miracles had never been performed; but he who was lame and was healed; he who was blind and afterwards received his sight; they who were leprous and were cleansed, after the miracles of Jesus and the apostles were performed upon them, had as little reason to doubt as we now have the power of the steam-engine or the agency of the telegraph. It is no longer a question of probabilities about which men may differ and speculate. It is the legal evidence of the existence of a fact based upon legal and competent proof, that we are bound to believe; for no man has the right to discredit competent moral and legal evidence because such evidence may not happen to accord with his own previous information and experience, for no man has the right to assume that his own experience is the only basis of his own knowledge.

In conclusion, we may well concede the fact that if Jesus Christ was a mere man, possessed of human powers only, with no divinity in him, the proof of miracles and the authenticity of the Scriptures is not made out, and men may well call them in question; but on the other hand, if he was divine as he claimed to be, if he came forth from the bosom of the Father, if he was clothed with all the powers and attributes of divinity, if the claim that he made for himself that all power in heaven and in earth belonged to him, if he had power to lay down his life and to take it again, if his wisdom was from above, if he was possessed of a duality of natures—the divine and the human—if he had a preexistence, if his office and mission to earth was to exalt men from a state of pollution to a state of holiness and to fit and prepare mankind for a future state of being in which their actions here determines their status there,—then we insist that miracles are not only possible, but probable, and that men should act with reference to the probable truths of the Bible as they act with reference to probabilities in all the graver affairs of life; and with this volume of evidence before us, we are able to shift the onus of proof upon infidelity, and say, in the light of legal evidence, that it is as impossible to set bounds to infinite power as it is to set bounds to space, and because thereof miracles, when viewed

from a legal stand-point, may be regarded as well authenticated as the evidence of any other fact.[1]

[1] Mr. Hume's argument is thus refuted by Lord Brougham. Here are two answers to which the doctrine proposed by Mr. Hume is exposed, and either appears sufficient to shake it: "First, our belief in the uniformity of the laws of nature rests not altogether upon our own experience. We believe no man ever was raised from the dead not merely because we ourselves never saw it—for that would be a very limited ground of deduction, and our belief was fixed on the subject long before we had any considerable experience—fixed chiefly by authority, that is, by deference to other men's experience. We found our confident belief in this negative position partly, perhaps chiefly, upon the testimony of others, and, at all events, our belief that in times before our own the same position held good must, of necessity, be drawn from our trusting the relations of other men; that is, it depends upon the evidence of testimony. If, then, the existence of the law of nature is proved, in great part at least, by such evidence, can we wholly reject the like evidence when it comes to prove an exception to the rule—a deviation from the law? The more numerous are the cases of the law being kept, the more rare are those of its being broken, the more scrupulous, certainly, ought we to be in admitting the proof of the breach; but that testimony is capable of making good the proof there seems no doubt. In truth, the degree of excellence and of strength to which testimony may arise seems almost indefinite. There is hardly any cogency which it is not capable, by possible supposition, of attaining; the endless multiplication of witnesses, the unbounded variety of their habits of thinking, their prejudices, their interests, afford the means of conceiving the force of their testimony augmented *ad infinitum*, because these circumstances afford the means of diminishing indefinitely the chances of their being all mistaken, all misled, or all combined to deceive us. Let any man try to calculate the chances of a thousand persons who come from different quarters and never saw each other before, and who all vary in their habits, stations, opinions, interests, being mistaken or combining to deceive us when they give the same account of an event as having happened before their eyes—these chances are many hundreds of thousands to one. And yet we can conceive them multiplied indefinitely, for one hundred thousand such witnesses may all, in like manner, bear the same testimony, and they may all tell us their story, written twenty-four hours after the transaction and in the next parish, and yet, according to Mr. Hume's argument, we are bound to discredit them all because they speak to a thing contrary to our own experience and to the accounts which other witnesses have formerly given us of the laws of nature, and which our forefathers had handed down to us as derived from witnesses who lived in the olden time before them. It is unnecessary to add that no testimony of the witnesses whom we are supposing to concur in their relation, contradicts any testimony of our own senses. If it did, the argument would resemble Archbishop Tillotson upon the Real Presence, and our disbelief would be at once warranted."

"Secondly. This leads us to the next objection to which Mr. Hume's argument is liable, and which we have in part anticipated while illustrating the first. He requires us to withhold our belief in circumstances which would force every

man of common understanding to lend his assent and to act upon his supposition of the story told him being true; for suppose either such numbers of various witnesses as we have spoken of, or, what is perhaps, stronger, suppose a miracle reported to us, first by a number of relators and then by three or four of the very soundest judges and the most incorruptibly honest men we know—men noted for their difficult belief of wonders, and, above all, steady unbelievers in miracles, without any bias in favor of religion, but rather accustomed to doubt, if not disbelieve. Most people would lend an easy belief to any miracle thus vouched. But let us add this circumstance, that a friend on his death-bed had been attended by us, and that we had told him a fact known only to ourselves—something that we had secretly done the very moment before we told it to the dying man, and which to no other being we had ever revealed—and that the credible witnesses we are supposing informed us that the deceased appeared to them, conversed with them a day or two, accompanying them, and, to vouch the fact of his reappearance on this earth, communicated to them the secret of which we had made him the sole depositary the moment before his death; according to Mr. Hume we are bound rather to believe not only that those credible witnesses deceived us, or that those sound and unprejudiced men were themselves deceived and fancied things without real existence, but further, that they all hit by chance upon the discovery of a real secret, known only to ourselves and the dead man. Mr. Hume's argument requires us to believe this as the lesser improbability of the two—as less unlikely than the rising of one from the dead; and yet every one must feel convinced that were he placed in the situation we have been figuring he would not only lend his belief to the relation, but if the relators accompanied it with a special warning from the deceased person to avoid a certain contemplated act, he would, acting upon the belief of their story, take the warning and avoid doing the forbidden deed. Mr. Hume's argument makes no exception, this is its scope, and whether he chooses to push it thus far or no, all miracles are, of necessity, denied by it, without the least regard to the kind or the quality of the proof on which they are rested; and the testimony which we have supposed accompanied by the test or check we have supposed, would fall within the grasp of the argument just as much, and as clearly, as any other miracle vouched by the more ordinary combinations of evidence."

The use of Mr. Hume's argument is this, and it is an important and a valuable one: It teaches us to sift closely and rigorously the evidence for miraculous events. It bids us remember that the probabilities are always, and must always be, incomparably greater against than for the truth of these relations, because it is always far more likely that the testimony should be mistaken or false, than that the general laws of nature should be suspended. Further than this, the doctrine can not in soundness of reason be carried. It does not go the length of proving that the general laws can not by force of human testimony be shown to have been, in a particular instance, and with a particular purpose, suspended.

Laplace, in his "Essai sur les Probabilités," maintains that the more extraordinary the fact attested, the greater probability of error or falsehood in the attestor. Simple good sense, he says, suggests this, and the calculation of probabilities confirms its suggestion. There are some things, he adds, so extraordinary that nothing can balance their improbabilities; the probability of error or of the falsehood of testimony becomes in proportion greater as the fact which

is attested is more extraordinary. And hence a fact, extraordinary in the highest possible degree, becomes in the highest possible degree improbable, or so much so that nothing can counterbalance its improbability.

This argument has been made much use of to discredit the evidence of miracles, and the truth of that divine religion which is attested by them, but, however sound it may be in one sense, the application of it is fallacious. The fallacy lies in the meaning affixed to the term extraordinary. If Laplace means a fact extraordinary under its existing circumstances and relations, that is, a fact remaining extraordinary, notwithstanding all its circumstances, the position needs not here to be controverted. But if the term means extraordinary in the abstract, it is far from being universally true, or of affording a correct test of truth as a rule of evidence. Thus, it is extraordinary that a man should leap fifteen feet at a bound, but not extraordinary that a strong and active man should do it under a sudden impulse to save his life. The former is improbable in the abstract, the latter is rendered probable by the circumstances. So things extraordinary, and therefore improbable, under one hypothesis become the reverse under another. Thus the occurrence of a violent storm at sea, and the utterance by Jesus of the words "Peace, be still," succeeded instantly by a perfect calm, are facts which, taken separately from each other, are not in themselves extraordinary. The connection between the command of Jesus and the calm, as cause and effect, would be extraordinary and improbable if he were a mere man, but it becomes perfectly natural and probable, when his divine power is considered. Each of those facts is in its nature so simple and obvious that the most ignorant person is capable of observing it. There is nothing extraordinary in the facts themselves, and the extraordinary coincidence in which the miracle consists becomes both intelligible and probable upon the hypothesis of the Christian. See the *Christian Observer* for October, 1838, p. 617.

Laplace was so fascinated with this theory, that he thought that the calculus of probabilities might be usefully employed in discovering the value of the different methods resorted to in those sciences which are in a great measure conjectural, as medicine, agriculture, and political economy; and he proposed that there should be kept in every branch of the administration an exact register of the trials made of the different measures and the results, whether good or bad, to which they had led. See the Edinburgh *Review*, Vol. xxiii, p. 335, 336. Napoleon, who appointed him minister of the interior, thus described him: "A geometrician of the first class, he did not reach mediocrity as a statesman; he never viewed any subject in its true light; he was always occupied with subtleties, his notions were all problematic, and he carried into the administration the spirit of the infinitely small." See the *Encyclopædia Britannica*, *Art.* Laplace, Vol. xiii, p. 101; Mémoires Ecrites á St. Helena i, 3. The injurious effect of deductive reasoning upon the minds of those who addict themselves to this method alone to the exclusion of all other modes of arriving at the knowledge of truth in fact is shown with great clearness and success by Mr. Whewell, in the ninth of the Bridgewater Teatise, book iii, chap. 6. The calculus of probabilities has been applied by some writers to judicial evidence, but its very slight value as a test is clearly shown in an able article on presumptive Evidence, Law Mag. Vol. i, p. 32, N. S.

CHAPTER II.

PRECEDENTS FOR CHURCH TRIALS AND INVESTIGATIONS.

In drafting charges and specifications for the trial of an accused bishop there should be a brief statement of the charge, defining the offense by its generic name, such as *libel, slander, falsehood, etc.* Each charge should be accompanied with one or more specifications, and the following form may serve to illustrate the manner of preparing the charges, varying such charges so as to meet the facts or evidence relied upon for a conviction.

FORMS FOR THE TRIAL OF A BISHOP.

The charges and specifications preferred against a bishop should be prepared and signed by the presiding elder of the district in which the immorality is alleged to have been committed, and by four traveling elders; and may be in the following form:

(No. 1.)

To the Judicial Conference, composed of the Triers of Appeals, summoned for the trial of ———, *one of the bishops of the Methodist Episcopal Church.*

The presiding elder of the district in which the immorality hereinafter complained of is alleged to have been committed, and four other traveling elders complain to said conference that Bishop——— has been guilty of immorality; and that they have investigated the subject, and charge him therewith, as follows:

CHARGE FIRST: *Publicly disseminating doctrines which are contrary to the Articles of Religion contained in the Discipline.*

Specification First—For that said the ———, Bishop of the Methodist Episcopal Church, in the United States of America, in the district of ———, presided over by ———, on the ——— day of ———, A. D. 18—, in a certain sermon (or discourse) publicly disseminated and declared that [*Here insert the substance of the language*] contrary to the rules and doctrine of the Discipline.

(Signed) ——— ———, *Presiding Elder.*
——— ———, *Traveling Elder.*
——— ———, *Traveling Elder.*
——— ———, *Traveling Elder.*
——— ———, *Traveling Elder.*

A copy of the charges and specifications should be delivered to or forwarded to the accused bishop; and notice thereof, accompanied with the original charges and specifications, should

also be given to one of the other bishops, who should convene a judicial conference to be composed of the triers of appeals from the five neighboring conferences where the alleged immorality is charged to have taken place.

The form of the notice from the presiding elder and the four traveling elders may be as follows:

(No. 2.)

To Bishop ———.

You are respectfully informed that ———, one of the Bishops of the Methodist Episcopal Church in the United States of America, has been accused of immorality; and that we, the undersigned, have investigated said charges, and believe them to be of such a character as that they should be inquired into by the proper tribunal of the Church having jurisdiction thereof; and herewith transmit to you charges and specifications, signed by us, accusing ——— of immorality, and request you to convene a judicial conference to inquire into and investigate said alleged immorality.

This notice should be signed by the presiding elder and four traveling elders who prefer the charges.

The form of the notice from the bishop to the Triers of Appeals may be as follows:

(No. 3.)

To ——— , *one of the Triers of Appeals, etc.*

You are hereby notified that a judicial conference has been ordered to be convened by me to meet at the city of ——— on the ——— day of ——— A. D. 18—, for the purpose of investigating and trying an alleged immorality, charged to have been committed by Bishop ———.

(Signed) ——— ———, *Bishop.*

In addition to furnishing the accused bishop with a copy of the charges and specifications, he should be notified by the bishop who is to preside at the trial of the time and place of the meeting of the judicial conference, and such notice may be as follows:

(No. 4.)

To Bishop ———,

You are respectfully informed that charges and specifications have been preferred against you, complaining of a certain immorality (or immoralities) and that I have ordered that a judicial conference be convened to meet at the city of ———, on the ——— day of ———, A. D. 18—, at — o'clock A. M., for the purpose of investigating said immorality (or immoralities) complained of against you, at which time and place you can appear, defend yourself, and vindicate your reputation.

(Signed) ——— ———, *Bishop.*

The form of the record when the judicial conference is convened may be as follows:

(No. 5.)

At a Judicial Conference, convened and presided over by Bishop ———, that met at the city of ———, on the ——— day of———, A. D. 18—, convened for the trial of Bishop ———, present (*Here insert the names of the Triers of Appeals summoned, etc.*) the following proceedings were had:—

Bishop ——— appeared and pleaded to the charges and specifications as follows: (*Here insert the plea.*) Bishop ——— challenged peremptorily the following Triers of Appeals: (*Here insert the names.*) And said Judicial Conference, for the trial of said alleged immorality, was composed of the following named Triers of Appeals: (*Here insert their names.*) ———, a traveling elder, appeared for the prosecution in support of the charges and specifications. ———, a traveling elder, appeared for the defense.

The prosecution, to maintain the issue on its part, called ———, who testified as follows: (*Here insert testimony.*) Also ———, who testified as follows: (*Here insert testimony.*) And also offered the following documentary evidence: (*Here insert such evidence.*)

The following question was asked in behalf of the prosecution, objected to by the defendant, and objection sustained (or objection overruled): (*Here insert the question and the ruling of the bishop presiding.*) (Where the objection is overruled, add that the defendant excepts, if such is the fact.)

This was all the evidence for prosecution in chief.

The accused made the following statements: (*Here insert his statement.*)

The defense then called ———, as a witness, who testified as follows: (*Here insert his testimony.*) Also ———, who testified as follows: (*Here insert testimony.*) This was all the evidence.

——— then addressed said conference in behalf of the prosecution, and ——— addressed said conference in behalf of the defense, and the argument was closed by ——— for the prosecution.

And said conference went into deliberation over said cause, and, after due deliberation, find as follows: (*Here insert the finding and the judgment of the conference.*)

The finding should be signed by all the members of the conference who concur. If there are members of the conference that do not concur in the finding, they may have their dissent of the finding entered of record.

Where the accused bishop is convicted by the judicial conference he may appeal from the decision of such conference to the General Conference, and such appeal, when taken, should be entered of record, and should be in the following form:

(No. 6.)

And the said ———, bishop, etc., having been convicted, and judgment having been passed upon him by the Judicial Conference aforesaid, and being in-

formed thereof, appeals from the action and decision of said Judicial Conference to the General Conference; it is ordered that the record, together with the documentary evidence, depositions, etc., be transmitted to the General Conference.

By the provisions of § 202 of the Discipline, complaint against the administration of the bishop may be forwarded to the General Conference and entertained there, provided that in its judgment due notice has been given; and the form of the record or trial before the General Conference may be substantially the same as the record of a judicial conference.

Where a bishop is charged with imprudent conduct under ¶ 200 of the Discipline, the charges and specifications should contain an averment that he has been admonished by a presiding elder and two traveling elders, and that he has been guilty of a second offense, has been admonished by one of the bishops, together with three traveling elders. This preliminary labor is jurisdictional, and unless it has been performed the judicial conference would have no authority to try a bishop charged with imprudent conduct.

The specification under § 200 of the Discipline should be substantially the same as for immoral conduct, with this addition:

And said presiding elder, having taken with him two traveling elders, admonished the bishop aforesaid so offending; and said bishop so offending not heeding the admonition aforesaid, was guilty the second time of imprudent conduct, and afterwards ———, one of the bishops, together with three traveling elders, called upon him, reprehended and admonished him the second time, and, notwithstanding said admonition, he still persists in his imprudent conduct, contrary to the rules of the Discipline, etc.

The method of proceeding against accused traveling preachers or ministers may be as follows:

(No. 7.)

FORM OF COMPLAINT.

To the ——— Annual Conference of the Methodist Episcopal Church of the United States of America:

CHARGE FIRST—*Libel.*

Specification First—For that heretofore, to wit, on the ——— day of ———, A. D. 18—, at and within said conference, A. B., then and there being a member of said conference, did maliciously write and publish of and concerning C. D., the following false and libelous matter; that is to say (*Here copy the writing complained of*), contrary to the rules of the Discipline.

Specification Second.—For that the said A. B., heretofore, to wit, on the ——— day of ———, A. D. 18—, at and within the conference aforesaid, did

write and publish certain other false, defamatory, and libelous matter of and concerning the said C. D., in the words following, that is to say (*Here copy the writing*), in violation of the rules of the Discipline.

Specification Third (*where the charge is not for writing but for publishing a libel.*—For that the said A. B. heretofore, to wit, on the ——— day of ———, A. D. 18—, at and within the Conference, uttered and published of and concerning C. D., the following false, defamatory, and libelous matter; that is to say (*Here copy the writing*).

If the charge is for verbal slander, after the caption, as in No. 7, you may proceed as follows to state the offense:

CHARGE—*Slander.*

Specification First.—For that A. B., a member of said Conference, heretofore, to wit, on the ——— day of ———, A. D. 18—, at and within the Conference aforesaid, did falsely speak, utter, and publish, in the hearing of divers respectable persons, the following false and slanderous words of and concerning C. D., that is to say, "he (meaning the said C. D.) is a thief," thereby intending to charge the said C. D. of the crime of larceny, contrary to the rules of the Discipline.

CHARGE SECOND.

Specification First.—The said A. B., on the ——— day of ———, A. D. 18—, at and within the Conference aforesaid, did falsely, willfully, and knowingly, speak the following words, that is to say (*Here insert the falsehood complained of*), contrary to the rules of the Discipline.

Where the charge is for larceny, either against a minister or member, the charge and specifications may be as follows, after the caption:

(No. 8.)

CHARGE FIRST—*Theft.*

Specification First—For that A. B., a member of said Conference (*or of said Church*), heretofore, to wit, on the ——— day of ———, A. D. 18—, at and within the Conference aforesaid, did take, steal, and carry away one pocket-book, the property of C. D., in violation of the Discipline of the Church.

CHARGE SECOND—*Burglary, with an intent to steal, etc.*

Specification First.—For that the said A. B., heretofore, to wit, on the ——— day of ———, A. D. 18—, at and within the Conference aforesaid, in the night-time, did break into and enter a dwelling house of C. D., with intent then and there to steal, contrary to the Discipline, etc.

If the intent be to commit some other offense in connection with the burglarious entry, the charge should be varied so as to correspond with the evidence; or as many different specifications may be embraced under the charge as are necessary, varying the intent in each, where it is doubtful what the actual intent was.

Where the charge is for adultery or fornication, after the caption, proceed as follows:

(No. 9.)

CHARGE FIRST—*Adultery.*

Specification First—For that A. B., heretofore, to wit, on the ——— day of ———, A. D. 18—, at and within the Conference aforesaid, being a member of said Conference (*or Church*), being a married man, did commit the crime of adultery with E. F., a married woman, the said E. F. not being the wife of the said A. B., contrary to the rules of the Discipline.

CHARGE SECOND—*Fornication.*

Specification First—For that the said A. B., heretofore, to wit, on the ——— day of ———, A. D. 18—, at the Conference aforesaid, and a member of said Conference (*or Church,*) did commit the crime of fornication with G. H., an unmarried woman, contrary to the rules of the Discipline.

In the precedents that we have given, we have averred the relationship that the accused sustains to the Church; not that it was necessary so to do—for the conference or Church tribunal will take judicial notice of that fact—but in order to avoid any question that may arise on that point.

It is sufficient, in all cases, to charge the offense in the generic language by which it is known, and under such charge as many different species of offense may be included, by specification or specifications, as the prosecutor sees proper to insert; *provided*, however, that each specification must sustain the charge and be germane to it.

Ordinarily two distinct crimes should not be embraced under one charge; but there are exceptions to this rule, for a party may commit two or more offenses by the same act, and where that is the case they constitute properly but one legal offense, as in burglary, accompanied with larceny.

The prosecutor in preparing the charges and specifications should be careful, in setting out the offense, so to describe it in each specification that it embodies all the essential prerequisites of the crime, and each should be accompanied with an averment of time and place, so as to apprise the accused more certainly of the nature of the charge upon which he is to be arraigned and tried. After the charges are regularly drawn up and signed, the accused should be served with a copy thereof, accompanied with a notice that the charges and specifications would be presented to the next annual conference.

After the meeting of the conference the charges and specifications, accompanied with a copy of the notice and a statement that the accused had been served with a copy thereof should be presented in open conference. This confers jurisdiction upon the conference, and it may either try the accused or refer the matter to the select number for trial.

Without an order of reference the select number have no authority or jurisdiction over the accused; they exercise only a delegated authority over that class of cases where such authority is conferred by the Discipline.

The order of reference, where the trial is referred to a select number, should be in the following form:

(No. 10.)

At a meeting of the ——— Annual Conference, begun and held at the city of ———, on the ——— day of ———, A. D. 18—, the following, among other proceedings, were had, to wit: Charges and specifications preferred by ——— against Brother ———, accusing him of ———; and said charges and specifications were referred to a select number, members of said Annual Conference, for trial; said select number consisting of (*Here insert the names*).

After the order of reference, the select number should assemble and arraign the accused before them if he has not been previously arraigned before the conference. Where he has been arraigned before the conference, the records of the conference and the order of reference should show the fact.

No order of reference should, however, be made to a select number until the accused member of the conference has been duly notified and served with a copy of the charges and specifications a sufficient time prior to the order of reference to give him time either to plead, prepare for trial, or imparl.

The notice may be given at any time before the meeting of the conference; *provided*, that a reasonable time should intervene between the time of the service of the notice and the meeting of the conference.

The select number should keep a regular record of its proceedings, which should be as follows:

(No. 11.)

At a meeting of a select number, members of the Annual Conference, to whom certain charges and specifications preferred by ——— against Brother ———, and by said Conference referred for trial to (*Here name the members of*

the select number), said select number, being convened for the trial of the said ———; the said ——— appeared before said select number, and the charges and specifications being read to him by the secretary, he pleaded thereto as follows: (*Here insert plea*); and issue being joined thereon, the said ——— appearing as counsel for the prosecution, introduced the following witness: (*Here insert witness's name*), who testified as follows: (*Here insert testimony*); also the following witness: (*Here insert name of witness*), who testified as follows (*Here insert testimony*); said witness being asked the following question, (*Here insert the question*), the same was objected to by the defendant; objection overruled by the chairman, to which ruling the accused excepted.

The prosecution also read the following depositions: (*Here insert the depositions*).

This was all the evidence on the part of the prosecution.

The accused preacher then made the following statement: (*Here insert statement*), and also called ———, who testified as follows: (*Here insert testimony*), also ———, who testified as follows: (*Here insert testimony*).

This was all the evidence on the part of the defense.

The prosecution then called ———, who testified in reply as follows (*Here insert testimony*).

This was all the evidence. Thereupon the select number retired to consider of the cause, and after due consideration and deliberation find the accused (*either not guilty or guilty*) in manner and form as charged in specification "First" under charge "First," and not guilty as charged in specification one under charge "Second." (The record should show the finding in accordance with the facts, and also the judgment of the select number; and the finding and judgment should be regularly signed by all of the select number who concur therein, and should be then certified by one or more of the secretaries of the Conference appointed to act as secretary of the select number.)

The certificate of the secretary may be as follows:

(No. 12.)

I, J. F., Secretary of the select number to whom was referred the trial of the said A. B. by the Annual Conference, do hereby certify that the foregoing is a full and correct record of the proceedings therein; and I return the same to the said conference, accompanied with the bill of charges, evidence taken, and decision rendered, with all other documents brought before said select number upon the trial, having marked the same exhibits "A," "B," and "C," respectively, to this record.

In testimony whereof I have hereunto set my hand, this ——— day of ———, A. D. 18—.

(Signed) ——— ———, *Secretary.*

The record of the select number should be regularly returned by either the chairman or the secretary of the select number into the annual conference, together with the bill of charges, the evidence taken, and the decision rendered, with all the other documentary evidence pertaining to the trial.

The accused when convicted may appeal, and the appeal should be regularly taken during the session of the annual conference from the decision of the annual conference to the judicial conference, instead of being taken from the decision of the select number; for in any view that may be taken of the question, it is the decision of the annual conference by intendment, whether it be referred to a select number or otherwise, and the form of the record of appeal may be as follows:

(No. 13.)

Upon the coming in of the report of the select number finding the said brother ——— guilty as charged in said complaint, and pronouncing sentence thereon, the said ——— prayed an appeal from the decision of said conference to the decision and determination of a judicial conference, which was accordingly allowed, and it was ordered by the conference that the record and all the documents relating to the case, together with the charge (or charges) and the specification (or specifications) duly certified by the secretaries of the conference be transmitted to the judicial conference to be convened for the trial of said cause.

The form of the certificate of the secretaries of the conference may be substantially in the form given for the certificate of the secretary of the select number.

Upon an appeal from an annual to a judicial conference by a traveling minister or preacher, he becomes the appellant, and it is his duty to prosecute the appeal, and to take notice of the meeting of the judicial conference, and of every subsequent step taken in the cause, for in contemplation of law he is the actor instead of *reus*.

Upon the appeal being taken it is made the duty of the president of the annual conference when notice of the appeal is given to proceed with due regard to designate three conferences, conveniently near that from which the appeal is taken, whose triers of appeals shall constitute a judicial conference; and it is also the duty of the president of the annual conference to fix the time and place of the meeting of the judicial conference, and to give notice thereof to all concerned; that is, to the triers of appeals of the three conferences selected, the party engaged in the prosecution, and the defendant.

The same form that we have given, notifying the triers of appeals for the trial of an accused bishop, is substantially sufficient to be used here varying it according to the facts.

The form of the notice to be given by the president of the annual conference to the parties may be as follows:

(No. 14.)

SIR,—You are hereby notified that a Judicial Conference has been convened by order of the President of the last Annual Conference, held at ———, in the State of ———, for the trial of ———, who has appealed from said Annual Conference to a Judicial Conference; and the meeting of said Judicial Conference has been fixed to take place at the city of ———, on the ——— day of ———, A. D. 18—, at — o'clock A. M. of said day, at which you can appear and be heard in said cause.

The form of the record should be substantially the same as the record of the trial of a bishop. It should show the convening of the judicial conference, the bishop who presided, the names of the persons who composed the judicial conference, the peremptory challenge or the challenges for cause, the grounds of appellant's appeal, the different preachers who appeared for the appellant and appellee, and the decision of the judicial conference.

And the forms that we have given are practically sufficient to enable the secretary to make up and authenticate the record.

Where there is a reversal of the decision of the annual conference by the judicial conference, there should be a *procedendo* awarded, which should be in the following form:

(No. 15.)

At a meeting of the Judicial Conference held at the city of ———, in the State of ———, on the ——— day of ———, A. D. 18—, for the purpose of inquiring into alleged error in the records and proceedings of the ——— Annual Conference with reference to the trial and conviction of ———:—

You are hereby respectfully informed that said Judicial Conference, after inspecting said records and proceedings find that there was manifest error therein; and for the purpose of correcting said error, we have remanded the same to said Annual Conference for a new trial.

In testimony whereof I, ———, Secretary of said Judicial Conference, do hereby set my hand this ——— day of ———, A. D. 18—.

(Signed) ——— ———, *Secretary.*

The record of the General Conference, upon an appeal from a Judicial Conference, may be as follows:

(No. 16.)

At a meeting of the General Conference, convened on the first day of May, A. D. 18—, at the city of ———, the following, among other proceedings, were had:

The appeal of the Rev. ——— from the decision of the Judicial Conference coming up on motion of ———, was referred to the Judiciary Committee for review and decisions on questions of law contained in said record.

And the same having been reviewed and examined by said Judiciary Committee, upon the report of said Judiciary Committee, and upon due consideration of the errors, or the alleged errors, in said record, it is ordered and determined that said record, and the decision of said Judiciary Committee, be in all things sustained and affirmed (or in all things reversed, vacated, and set aside; and that said cause be remanded to the ——— Annual Conference from which it was appealed to the Judicial Conference, for further proceedings not inconsistent with decision of the General Conference).

A copy of this record, properly certified by the secretaries, should be transmitted to the next annual conference to be held in the Conference in which the proceedings originated.

When the record is transmitted to the annual conference, it is their duty to proceed *de novo*.

PROCEEDINGS AGAINST PREACHERS ON TRIAL,

Or Local Preachers Before the Quarterly Conference.

(No. 17.)

To the Quarterly Conference of the ——— Station (or Circuit) of the Methodist Episcopal Church.

Charge First—*Dishonesty.*

Specification First—For that E. F., a preacher on trial, heretofore, to wit, on the ——— day of ———, A. D. 18—, at and in the Circuit aforesaid, being amenable to said Quarterly Conference, on which he travels, did falsely and fradulently represent a certain horse, sold by him to I. J., to be sound, etc., whereas said horse was unsound and of little value, having the disease of ———, which fact was well known to the said E. F., but notwithstanding the premises, he represented him to be sound, contrary to the rules of the Discipline.

(Signed) ——— ———, *Member of M. E. Church.*

Where preliminary labor is required by the Discipline before a preacher is liable to be dealt with canonically, we think that it is essential to the jurisdiction of the conference—whether annual, district, or quarterly—that it should be averred in the complaint, or in the charges and specifications, that such preliminary steps required by the Discipline have been taken; for without such averment there is nothing to show that the conference has jurisdiction; and the averment may either precede the charges and specifications or it may be embodied in the specifications; but

where set forth in the specifications it must be set forth in each specification.

We give a precedent in the case of improper temper, where the Discipline makes it the duty of the preacher in charge to reprehend a local preacher:

(No. 18.)

To the Quarterly Conference of the Methodist Episcopal Church of ——— Station (or Circuit):

For that A. B., a local elder of said Church, belonging to and under the jurisdiction of said quarterly conference, has been charged with being guilty of improper temper, such as was unbecoming a member of said Church and his official station in said Church; and being so charged was afterwards reprehended by the preacher having charge of said station (or circuit), yet, notwithstanding he was so reprehended, the said ——— was guilty of a second transgression, and the said preacher in charge called to his aid three faithful friends as witnesses and reprehended him the second time; yet, notwithstanding the premises and the repeated admonitions, the said ——— continued impenitent and persists in improper temper, thereby bringing reproach upon the Church.

CHARGE FIRST—*Improper Temper.*

Specification First—For that the said ——— heretofore, to wit, on the ——— day of ———, A. D. 18—, at and within the station (or circuit) aforesaid, on [three several occasions, became angry and displayed improper temper, accompanied by the use of words and actions unbecoming a Christian, and in violation of the rules of the Discipline.

In all cases where preliminary labor is required by the Church, a like averment, showing that the requirement of the Discipline has been complied with, should precede the charges and specifications.

Forms of charges and specifications, and the record of the proceedings that we have previously given, may readily be adapted to and used in cases of mere preliminary examination. A safe rule is this: have the record contain a full, complete, and perfect history of the trial, and the forms and precedents that we have given will serve as guides, varied to suit the facts.

FORMS FOR TAKING AND AUTHENTICATING DEPOSITIONS.

(No. 19.)

FORM OF NOTICE.

To ——— ———.

You are hereby notified that I have been appointed by the presiding elder of ——— District, within the district where the witnesses whose testimony is

desired reside, in a certain cause now pending before the Church, wherein certain charges and specifications have been preferred by ——— against you, and are now depending for trial before ——— Conference (or committee); and by virtue of such appointment, on the ——— day of ———, A. D. 18—, at —— o'clock A. M., at ——— (*Here name the place*) I will proceed to take the depositions of (*Here insert the names*); said deposition when so taken to be read in evidence on the trial (or investigation) of said charges and specifications; at which time and place you may be present and cross-examine said witness if you be so advised.

(Signed) ——— ———, *Pastor.*

(Dated).

In pursuance of the annexed notice, I, H. K., Pastor of the Methodist Episcopal Church at ———, appointed by the presiding elder of the District mentioned in said notice to take the depositions of ———; in pursuance of said notice, and at the time and place therein mentioned, I proceeded to take said depositions upon oral interrogatories:

——— appearing as counsel for the prosecution, and ——— for the accused. Said deposition when so taken to be read in evidence in behalf of the prosecution. ———, of lawful age, being called, testified as follows in answer to the following interrogatory:

Inter. First: What is your name, age, occupation, and place of residence?

Inter. Second: Are you acquainted with ———, and how long have you known him?

At the conclusion of the examination in chief, the following request should be made:

State any other matter or thing with reference to the matters in controversy within your own personal knowledge, as fully as though you were specially interrogated thereto.

(*Answers.*)

(*Cross interrogatories.*)

If either party object to the form of the question or questions, the objection should be briefly noted; otherwise all objections as to form will be considered as waived, but the preacher taking the deposition has no authority to decide upon the objection, but should note it, and leave it to the presiding officer before whom the trial or investigation has taken place for his decision.

After the deposition is written, and before the proceedings are adjourned and the parties separate, it should be read over to the witness, and signed by him.

And the preacher before whom the same was taken should append his certificate, which should be in the following form:

(No. 20.)

I, H. K., before whom the foregoing deposition was taken, do hereby certify that the same was duly taken, and reduced to writing by me at the time and place mentioned in the caption to said deposition, and was then carefully read over to said witness, who signed the same in my presence.

In testimony whereof I have hereunto set my hand this ——— day of ———, A. D. 18—. (Signed) ——— ———, *Pastor.*

The deposition should then be sealed up by the person taking the same, and transmitted to the presiding officer of the trial; and should remain sealed until opened by proper authority.

The deposition should, however, be opened before proceeding to trial, in order to give the opposite party an opportunity to move for its suppression.

Where a sufficient notice has not been given of the taking of a deposition, if the opposite party did not attend and cross-examine, it is a good ground for suppressing the deposition.

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